

**MARRIAGE IN  
THE WESTERN CHURCH**

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AND LANGUAGE

EDITORS

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# MARRIAGE IN THE WESTERN CHURCH

THE CHRISTIANIZATION OF MARRIAGE DURING THE  
PATRISTIC AND EARLY MEDIEVAL PERIODS

BY

PHILIP LYNDON REYNOLDS



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*To the Memory of  
John M. Todd  
1918-1993*



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## ABBREVIATIONS

Ahi.	<i>Ahistulfi Leges</i> , in <i>MGH Leges</i> (folio), vol. 4 (1868).
Brev.	<i>Breviarium Alarici</i> (ed. G. Haenel, Leipzig, 1849).
CCG	<i>Corpus Christianorum, series graeca</i> . Turnhout, Belgium, 1977–.
CCL	<i>Corpus Christianorum, series latina</i> . Turnhout, Belgium, 1953–.
CCM	<i>Corpus Christianorum, continuatio mediaevalis</i> . Turnhout, Belgium, 1966–.
CJ	<i>Codex Iustinianus</i> (ed. P. Krueger, Berlin, 1877).
Cod. Theod.	<i>Codex Theodosianus</i> (ed. P. Krueger and T. Mommsen, 3 vols., Berlin, 1905).
col., cols	column, columns (used only when the reference is to a selection that is less than the whole of the work cited).
CSEL	<i>Corpus Scriptorum Ecclesiasticorum Latinorum</i> . Vienna, 1866–.
DDC	<i>Dictionnaire de droit canonique</i> . Ed. R. Naz, 7 vols., Paris, 1935–65.
Dig.	<i>Digesta Iustiniani</i> (ed. T. Mommsen, 2 vols., Berlin, 1870).
GCS	<i>Die griechischen christlichen Schriftsteller der ersten drei Jahrhunderts</i> . Berlin, 1897–.
Gratian	Gratian, <i>Concordantia Discordantium Canonum</i> (= <i>Decretum Gratiani</i> ). In <i>Corpus Iuris Canonici</i> (ed. A. Friedberg, 2 vols., Leipzig, 1879–81), vol. 1.
Haddan and Stubbs	<i>Councils and Ecclesiastical Documents relating to Great Britain and Ireland</i> . Ed. Arthur W. Haddan and W. Stubbs, 3 vols., 1869–78.
Hefele-Leclercq	C. J. Hefele and H. Leclercq, <i>Histoire des Conciles</i> . Paris, 1907–52.
Inst.	<i>Institutiones Iustiniani</i> (ed. P. Krueger, Berlin, 1869).
Lex Gund.	<i>Lex Gundobada</i> ([the Germanic code of the Burgundians] in <i>MGH, Leges</i> 2.1, 1892).
Lex Rib.	<i>Lex Ribvaria</i> (in <i>MGH Leges</i> 3.2., 1954).
Lex Rom. Burg.	<i>Lex Romana Burgundionum</i> (in <i>MGH Leges</i> 2.1, 1892).

<i>Lex Vis.</i>	<i>Lex Visigothorum</i> (in <i>MGH Leges</i> 1, 1902).
Li.	<i>Liutprandi Leges</i> , in <i>MGH Leges</i> (folio), vol. 4 (1868).
Mansi	<i>Sacrorum conciliorum nova et amplissima collectio</i> , ed. Giovanni Domenico Mansi. 60 vols. Florence, 1759 ff.; Venice, 1796 ff.; Paris-Arnheim-Leipzig, 1901–27.
MGH	<i>Monumenta Germaniae Historica</i> .
<i>MGH Capit.</i>	<i>MGH, Capitularia Regum Francorum</i> (= <i>Leges</i> sectio II). 2 vols., 1883–97.
<i>MGH Conc.</i>	<i>MGH, Concilia</i> (= <i>Leges</i> sectio III). 1893–.
<i>MGH Epist.</i>	<i>MGH, Epistolae</i> (quarto). 1887–.
<i>MGH Leges</i>	<i>MGH, Leges Nationum Germanicarum</i> (= <i>Leges</i> sectio I).
<i>MGH Leges</i> (folio).	<i>MGH, Leges</i> , folio series. 5 vols. 1835–89.
<i>MGH Script Rer. Mer.</i>	<i>MGH, Scriptores Rerum Merovingicarum</i> .
<i>Nov.</i>	<i>Novellae Leges</i> ([Justinian's novels] ed. R. Schoell and G. Kroll, Berlin, 1895).
<i>Nov. Theod</i>	<i>Novellae Theodosiani</i> (in <i>Cod. Theod.</i> ).
p., pp.	page, pages (used only when the reference is to a selection that is less than the whole of the work cited).
PG	<i>Patrologia Graeca</i> (i.e. <i>Patrologiae cursus completus, series graeca</i> ). Ed. J. P. Migne, Paris, 1857–66.
PL	<i>Patrologia Latina</i> (i.e. <i>Patrologiae cursus completus, series latina</i> ). Ed. J. P. Migne, Paris, 1844–64.
Ro.	<i>Edictus Rothari</i> , in <i>MGH Leges</i> (folio), vol. 4 (1868).
RSV	The Revised Standard Version of the Bible.
SC	<i>Sources chrétiennes</i> . Paris, 1941–.
X	<i>Liber extra</i> (i.e. <i>Decretales Gregorii IX</i> ). In <i>Corpus Iuris Canonici</i> (ed. A. Friedberg, 2 vols, Leipzig, 1879–81), vol. 2.



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## INTRODUCTION

### THE CHRISTIANIZATION OF MARRIAGE

This book examines the manner in which marriage acquired a specifically Christian identity in the Latin West during the first millennium after Christ. It is not concerned with the actual married life of Christians during this period (a matter about which we know very little), but rather with the manner in which men of the Church understood and regulated marriage. Thus it deals with a Christian *concept* of marriage and with how bishops and theologians developed their own understanding of the nature and purpose of marriage in the light of the Gospel.

I shall treat some topics in the general area of early medieval marriage only very briefly or in passing or not at all. First, although we shall note the function and significance of the nuptial liturgy, this book does not contain a detailed account of this liturgy and its history.<sup>1</sup> Second, we shall be concerned with the regulation of sexual behaviour only insofar as this pertains directly to the Christian understanding of the nature and purpose of marriage. Thus I have little to say here on the Church's attempts to suppress masturbation, homosexual acts, buggery, *coitus a tergo*, intercourse at improper times and in improper places, and so on.<sup>2</sup> Third, the book refers only in passing to the Church's laws on impediments of relationship.<sup>3</sup> Fourth, there is no extensive treatment of the Church's general response to the problems of sexual immorality, pre-marital sex and the prevalence of concubinage.

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<sup>1</sup> Korbinian Ritzer has surveyed the history of the nuptial liturgy in great detail in his *Formen, Riten und religiöses Brauchtum der Eheschliessung in den christlichen Kirchen des ersten Jahrtausend* (1962) (translated as *Le mariage dans les églises chrétiennes du Ier au XIe siècle* [1970]).

<sup>2</sup> On the regulation of sexual behaviour in the penitential literature, see P. Payer, *Sex and the Penitentials: the Development of a Sexual Code 550–1150* (1983).

<sup>3</sup> On this, see J. H. Lynch, *Godparents and Kinship in Early Medieval Europe* (1986), and F. X. Wahl, *The Matrimonial Impediments of Consanguinity and Affinity* (1934). For summary accounts, see J. Goody, *The Development of the Family and Marriage in Europe* (1983), pp. 134–46 (on the prohibited degrees of consanguinity and affinity), and pp. 194–204, *passim* (on the impediments of spiritual kinship arising from sponsorship at baptism).

Christianization was the process by which marriage became differentiated from its non-Christian origins and environment under the influence of Christianity itself. The peoples of the early Church and of the early Middle Ages brought with them into the Church their own, pre-Christian laws and customs of marriage, and to a large extent these laws and customs endured. Insofar as the influence of the Christian faith (that is, of the Christian Scriptures and of specifically Christian beliefs and ideals) caused marriage to become distinguished from the relevant pre-Christian traditions, we may say that marriage had become Christianized.

One should distinguish between two kinds of Christian influence. On the one hand, Christians applied to the particular case of marriage certain general ethical or societal principles. On the other hand, there were Christian ideas and doctrines that pertained specifically to marriage, and in this case the distinction between what was Christian and what was non-Christian was usually sharper. It is with the second kind of influence that we are mainly concerned here. Although this distinction is not always clear in practice, we may illustrate it with an example from the New Testament.

In Colossians 3:18–4:1, St Paul provides a simple code of practice for each of the following three groups: husbands and wives, parents and children, and masters and slaves. Paul takes these parallel domestic relationships as he finds them in the society of his day and applies certain Christian principles to them. In each case, the dominant partner should show patience and understanding, while the subordinate partner should be obedient. Paul also provides some hints as to the theological source of these virtues: wives should be subject to their husbands “as is fitting in the Lord;” children should be obedient to their parents because this is pleasing to the Lord; masters should remember that the Lord is *their* master. Although Paul attaches each hint to one case, each of them points to general principles that apply in all three cases. It would be neither difficult nor inappropriate to extend Paul’s code of practice to commanders and soldiers, kings and their subjects, schoolmasters and pupils, and so on.

An elaborated version of this code appears in Ephesians, whose author may have used the version from Colossians as his model. As in Colossians, the author gives advice first to husbands and wives (5:22–33), then to parents and children (6:1–4) and finally to masters and slaves (6:5–9). Here, how-

ever, the first category is the subject of an extended theological reflection upon marriage in the light of Christ's union with the Church, and the author assimilates the latter union to marriage. He brings together the Pauline theme of the Church as Christ's body and the idea taken from Genesis 2:24 that husband and wife are two in one flesh. (1 Cor. 6:15–17 may have suggested this.) A husband should love his wife as Christ loves the Church and should regard her as his own body. It would be difficult to apply these considerations to the case of parents and children or to the case of masters and slaves.

Likewise, Jesus' treatment of divorce in the synoptic gospels, where he declares marriage to be permanent because God made husband and wife two in one flesh in the beginning, conveys a specifically marital ideology. One might extend this teaching to other cases (for example, that of bishops and their dioceses), but only in an analogical way, by assimilating the other cases to marriage.

As these examples show, the Christianization of marriage is as old as Christianity itself. There are, however, special forms of this Christianization that did not develop until two or three centuries had passed.

First, the process of differentiation appeared in greater relief insofar as Christians themselves were aware of it and made it an aspect of their own self-definition and sense of identity. Thus Augustine emphasized that marriage in the Church was something very different from marriage among the Gentiles (that is, the pagans) or among the Israelites. He thought that marriage was indissoluble in the Church but impermanent outside it. The Latin Fathers distinguished sharply between the human law of marriage and the divine law of marriage. (Again, indissolubility was the crux of the distinction.) This differentiation appeared in still greater relief insofar as Christian spouses seemed not only to obey different rules but to be differently related, as if the marriage of Christians was a relation or state different from the marriage of non-Christians. This sense of the distinctness of Christian marriage was present long before marriage became regarded as one of the seven sacraments.

Even when distinguishing their own values from those of the world at large, the Fathers sometimes joined forces with trends in pagan culture. Authors such as Clement of Alexandria, Jerome and Augustine adopted elements of a sexual morality that had originated in Graeco-Roman philosophy and was manifest in pagan writers such as Plutarch, Musonius Rufus

and Seneca. Without covering their tracks entirely, they made it seem as though this moral teaching was something peculiarly Christian that had originated in the Gospel. There is no reason in logic why a central tenet of Christian doctrine must be distinctively or characteristically Christian, since what really counts is that Christians should believe this tenet, and not that non-Christians do not believe it. Nevertheless, in practice the adherents of any religion define what is central to their faith by distinguishing themselves from infidels, especially in their early and formative period.

Second, there is an aspect of the Christianization of marriage that has no exact parallel in either of the sister-religions, Judaism and Islam: namely, the distinction made, even within the life of devout Christians, between the sacred and the secular domains. Whatever the reason for this distinction may be, it is related both to Christianity's being a "mystery religion," with her own forms of initiation and ritual, and to the recognition that the Christian should remain obedient both to civil and to divine authority (cf. Mark. 12:13–17 and Rom. 13:1–7). From one point of view, marriage seemed to be on the secular side of the divide, for although Augustine emphasized the peculiarities of marriage "in the Church," those who devoted themselves to God by becoming "dead to the world" rejected marriage. Not only was their celibacy an important and necessary part of their new way of life, but it was also a symbol of their rejection of the world and of its mundane preoccupations. Such persons, like the prudent virgins of Jesus' parable, were ready for the next life, in which no-one would marry or be given in marriage (Luke 20:35). Contrariwise, to marry was to affirm decisively that one remained in the world.

Nevertheless, Isidore of Seville included a discussion of marriage in his treatise on the offices of the Church and on their origins.<sup>4</sup> Having discussed the liturgy of the Church at length (in Book I), Isidore goes on to treat the following matters (in Book II): (i) the various clerical orders; (ii) monks, penitents, virgins, widows and married persons (*coniugati*); and (iii) things pertaining to initiation (the catechumenate, exorcism, baptism, the creed, chrism and so on). The second of these three broad

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<sup>4</sup> *De ecclesiasticis officiis*, ed. by C. M. Lawson, CCL 113. Lawson argues that the work was written between 598 and 615 AD (p. 14\*); that it was originally called *De origine officiorum* (p. 14\*); and that the division into two books is not original (pp. 16\*–18\*).

topics has been aptly described by Christopher Lawson as “special states of life within the Church.”<sup>5</sup> In referring to virgins and widows, Isidore was thinking of persons who had voluntarily dedicated themselves to these ways of life as ways of serving God, and they would normally have confirmed this dedication by vows and by consecration. Thus Isidore thought marriage to be a religious vocation. Christianity sets standards for other relationships that are in their different ways analogous to marriage, such as the relations between business partners, between rulers and subjects, between masters and slaves, between captains and sailors, and between soldiers and their leaders. But these other relationships are not “special states of life within the Church.”

Isidore’s inclusion of marriage among the states of life within the Church is closely related to (and was probably influenced by) Augustine’s notion that one may divide Christians into three kinds: clerics, monks or continents, and married folk.<sup>6</sup> Because of a typological interpretation of Ezekiel 14:14, exegetes reasoned that Noah, Daniel and Job (the three persons whom God would spare in a cursed land) respectively typified the three vocations. This classification with its typology remained popular at least until the twelfth century. In a related scheme, the types were the three pairs of persons from each of which the Lord would take one and leave the other when he returned (Matt. 24:40–41 and Luke 17:34–36). Here the two women grinding at the mill represented married persons. Although exegetes assumed that married persons constituted the humblest rank and were preoccupied with the things of this world (the *saeculum*), they treated marriage, unlike such things as farming and soldiering, as a religious vocation rather than as an honourable alternative to one.

Third, the differentiation of the Christian understanding of marriage caused the Church to institute her own matrimonial jurisdiction. This aspect of the history of marriage in the Latin West is the subject of two important studies by Pierre Daudet.<sup>7</sup>

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<sup>5</sup> *Ibid.*, p. 16\*.

<sup>6</sup> See G. Folliet, “Les trois catégories de chrétiens. Survie d’un thème augustinien,” *L’année théologique augustinienne* 14 (1954), 82–96; and Jonas of Orléans, *De institutione laicali* II.1, *PL* 106:169–70.

<sup>7</sup> Both works are entitled *Études sur l’histoire de la juridiction matrimoniale*, and they are usually referred to by their subtitles: *Les origines carolingiennes de la compétence exclusive de l’église* (1933); and *L’établissement de la compétence*

The Church was already excommunicating adulterers in the third century, and this practice may have been as old as the regime of excommunication and penance itself. The Church also developed her own apparatus for prosecuting inquiries and passing sentence. By the late fourth century in some Western provinces (I shall argue), the Church regarded remarried divorcees as adulterers in the strict sense and therefore excommunicated them. Under this regime, the sinners could come back into the Church after a period of penance, but only on condition that they at least abstained from sexual relations with their new partners, whom the Church did not consider to be their true spouses. Not only did bishops use ecclesiastical tribunals and sanctions to enforce the Church's own prohibition of divorce and remarriage, but they reserved the right to declare a putative marriage to be invalid. As in Roman law, a judge could find that an alliance fell short of valid marriage because the persons in question were not suitably qualified. Nevertheless, marriage was still a civil matter as well, and the Church was not yet in a position to determine the civil consequences of marriage (for example, those pertaining to inheritance and citizenship). The history of the relationship between these two jurisdictions is complicated. Suffice to say that not until the high Middle Ages did civil jurisdiction become subordinate to ecclesiastical jurisdiction.

Marriage in the Christian tradition was both sacred and secular. The rites of baptism and eucharist, while not without parallel and precedent in the secular domain, were things that Christianity created and introduced. They served to set Christians apart from non-Christians. Marriage, on the contrary, was already there. Moreover, in the Jewish tradition it was a domestic rather than a priestly rite, and in Roman society getting married was an entirely secular event.<sup>8</sup> Marriage in the Roman Empire was subject to secular laws that determined its criteria, its conditions of validity and its effects. As far as we know, members of the early Christian community got married in same way as their non-Christian neighbours. There is no evidence that the Church required any special rite or even that Christians customarily observed one. Thus persons who were already married before

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*le l'église en matière de divorce et de consanguinité (France Xe-XIIe siècles)* (1941).

<sup>8</sup> The ancient rite of *confarreatio* had long fallen into desuetude by the beginning of the Christian era.



they converted to Christianity entered the body of Christ as married persons. By becoming baptized, they committed themselves to do whatever the Gospel required in respect of marriage, including Jesus' teaching against divorce and remarriage, a teaching that was markedly at variance with contemporaneous Judaic and Roman law. St Paul advised that even if only one partner in a marriage converted and was baptized, the believer should not leave an infidel spouse who remained amicably disposed, since the latter would be "sanctified" by the relationship (1 Cor. 7:12–15). In short, Christianity did not institute marriage, but rather baptized or christened it.

As we have noted, Christianization did not remove the secular dimension of marriage, and this twofold aspect remained a formative principle throughout the Middle Ages and beyond. This twofold aspect of marriage was related to another that was to raise acute problems throughout the patristic and medieval periods: namely, that marriage seemed to be on the one hand a carnal relationship centred on sexual intercourse and sexual procreation, and on the other hand something essentially holy and sanctifying. While attempts to solve the apparent disparity were formative, it was never resolved, as we shall see in the cases of both Augustine and Hincmar of Reims.

Whether or not there was any Christian nuptial liturgy before the fourth century is a matter that remains controvertible, but there is no evidence that the medieval Western Church ever required priestly benediction or any other liturgical form as a condition for validity. It is not until the ninth century that we find anyone declaring that a marriage is invalid unless a priest has joined and blessed the man and woman, and even then the position was undermined by the denial of nuptial benediction to remarrying widowers and widows and even to those who had not preserved their chastity before marriage. The marriages of such persons, while perforce unblessed, were not invalid. The medieval Church tried to ensure that persons married *in facie ecclesiae*, but this was not a condition for validity. (When the bishops at the Council of Trent made clandestinity an impediment, they were explicitly innovating. Clandestine [i.e., non-ecclesiastical] marriage had long been a sin, but liceity is not the same as validity.) The normative position in the West, therefore, was such that Christians who married by the customary secular means would, if there were no impediments, be recognized as validly married by the Church. If the marriage of Christians was different from the marriage

of non-Christians, this was due not to the manner in which the spouses became married but to their condition as baptized persons and as members of the Church.

Herein lies a major difference between the Christianization of marriage in the West and that in the East.<sup>9</sup> The Byzantine emperor Leo VI (866–912) ruled that the Eastern liturgy of nuptial benediction, including the ritual of crowning in the case of a first marriage, was a necessary condition for validity. Marriage came to be regarded as something done by a celebrant to the spouses, and the exchange of vows, while a precondition for validity, was not part of the ceremony.<sup>10</sup> Orthodox writers treat marriage as but one aspect of the Church's life of prayer and worship, and theological reflection upon marriage is hardly possible without reference to the liturgy.

The contrast between West and East in this matter is well known, but certain questions remain. It is difficult to ascertain what motivated a liturgical trend of the Frankish Church in the ninth century, when some were inclined to argue that the nuptial blessing was necessary for validity. Was the aim merely that the Church should supervise and witness marriages to prevent abuses? or did Frankish churchmen attribute some quasi-sacramental function to the nuptial blessing?

Christianization often involved the adoption of new rules and new standards of behaviour. Sometimes, however, a rule from secular law was adopted as it stood but given a specifically Christian rationale. When Pope Leo I, for example, determined that a man who had been cohabiting with a servile woman was not married to her and was therefore free to marry another woman, his position was that of Roman law, according to which there could be no *conubium* between a free and a servile person (in other words, such persons were not qualified to contract a valid marriage between themselves). But Leo did not appeal to Roman law: on the contrary, he attempted to prove his rule by means of a theological argument derived from the fifth chapter of Ephesians. He argued that the marriage between a freeman and a bondswoman was too unlike the union between Christ and the Church to contain the nuptial mystery.

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<sup>9</sup> See C. Vogel, "Les rites de la célébration du mariage," in *Il matrimonio nella società altomedievale* (1977), vol. 1, pp. 397–465; and Eve Levin, *Sex and Society in the World of the Orthodox Slavs, 900–1700* (1989), pp. 83–88.

<sup>10</sup> See K. Ware, "The sacrament of love: the Orthodox understanding of marriage and its breakdown," *Downside Review* 109 (1991), pp. 83–86.

Was the Christianization of marriage the same thing as the coming into existence of Christian marriage? No doubt this depends upon what one means by "Christian marriage." Some historians maintain that there was no such thing as Christian marriage before the twelfth century.<sup>11</sup> The point of this assertion seems to be that one can only speak properly of Christian marriage, in this restricted sense of the phrase, insofar as the Church considers the marriage of baptized Christians to have attributes that do not belong to the marriage of non-Christians. For while Christianity may have her own doctrines and laws about marriage, and while good Christian spouses will pay heed to these, it does not follow from this that the marriage *per se* of Christians is distinct from the marriage of non-Christians. Modern canon law, on the contrary, considers it meaningful to ask whether a particular marriage is itself objectively sacramental or non-sacramental, and it determines that if neither partner is a baptized Christian, the marriage must be non-sacramental, regardless of what the spouses do or feel or think. It is arguable that the roots of this distinction lie in two medieval theories: the first is that a marriage in which either or both of the partners is not baptized is dissoluble; and the second is that the marriage of two baptized persons, but not of two unbaptized persons, confers sacramental grace. Both of these theories arose in high medieval theology, and it is probably true to say that no such notion of Christian marriage existed before this period. Indeed, whether it existed in earlier periods is a question that one raises only from the perspective of hindsight. Nevertheless, there was some sense in earlier periods (in Augustine, for example) that being married in the Church was fundamentally different from being married outside the Church.

Understood more broadly, Christian marriage consists in the marital beliefs, rules, standards and practices that appear in the theological and canonical sources. We shall examine this broad subject area from a particular point view, for we are concerned with the specifically Christian contribution to this material. Several kinds of question arise. What does any particular element owe to secular and pre-Christian traditions,

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<sup>11</sup> Cf. J. Bernard, "Théologie et droit matrimonial," *Revue de Droit canonique* 39 (1989), p. 69: "Pendant le premier millénaire, il n'y a pas de 'mariage chrétien,' il n'y que des époux plus chrétiens que d'autres, répètent les historiens."

and what does it owe to specifically Christian influence? In what manner, and with what guiding convictions and intuitions, was marriage the object of theological reflection? How did Christian authors and bishops interpret and apply the relevant texts from the Bible? We should also seek explanations for two peculiarities of the Western tradition: that the nuptial liturgy did not become central to the Christian understanding of marriage as a holy and divinely instituted union; and the insistence on the absolute indissolubility of marriage.

### *The Biblical Sources*

One of the striking features of the medieval theology of marriage is its reliance on a few short texts, whose meaning was the subject of endless reflection. The story of the Christianization of marriage is the story of how churchmen interpreted and applied these pregnant texts. In their view, three sources expressed fully the Gospel's teaching on marriage: Jesus' teaching on divorce, which appears in various forms in the synoptic gospels; the fifth chapter of Ephesians; and the seventh chapter of Paul's first letter to the Corinthians. The first two of these sources refer to the same Old Testament text, namely Genesis 2:24: "For this reason a man will leave his father and mother and cleave unto his wife, and they shall be two in one flesh." The Fathers also reasoned that the New Covenant's vocation of virginity (as exemplified by Jesus and his mother) had superseded the Old Covenant's obligation to procreate. These sources set the agenda for those seeking to understand marriage in the light of the Gospel and to inculcate the divine law of marriage. We shall briefly review them here.

#### *Jesus' teaching on divorce*

When Jesus was asked for his opinion on the Mosaic law of divorce, which allowed a man to dismiss his wife and to remarry, he explained that Moses introduced this law as a concession to men's hardness of heart.<sup>12</sup> In the beginning, God made man and woman and said, "For this reason a man shall leave his father and mother and cleave unto his wife and they shall be two in one flesh." It is of some significance, as we shall see, that Jesus himself ascribes this dictum to God

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<sup>12</sup> Mark 10:2-9; Matt. 19:3-9 and 5:31-32; Luke 16:18.

(Matt. 19:4–5). Jesus deduces that husband and wife are no longer two, but rather one flesh, and that no man should separate what God has joined together. Not only have the two become one, but this union is one of the things that God made in the beginning. Although Jesus' point seems to have been that God created this union in the beginning, the texts may suggest that God somehow joins each couple.

What does all this suggest about the nature of marriage?

First, marriage is a union of "two in one flesh." This suggests that coitus is implicated in some way in the joining of husband and wife. St Paul (rather shockingly) even applies Genesis 2:24 to the case of sexual intercourse with a prostitute. He argues that the Christian man, as a member of Christ's body, should not have intercourse with a prostitute, for it is written: "they shall become two in one flesh." Thus the man will become one body with the prostitute (1 Cor. 6:15). If marriage is a union of two in one flesh, is sexual intercourse necessary for its consummation? And if marriage is indissoluble because it is a union of two in one flesh, is it coitus that makes it indissoluble? If the answer to these questions is Yes, what is one to say about the marriage of Mary and Joseph?

Second, the sources suggest that marriage is in some way a union made by God. Spouses should not divorce because God has joined them together, and because no human agent should separate what God has joined. Does this imply that *God* may separate the spouses? And what is the relationship between the union that God makes and the union of two in one flesh? The latter seems to entail sexual intercourse. The texts do not distinguish the God-created union from the union of two in one flesh, but one might expect that the gulf that existed in the medieval mind between the spiritual and the carnal would sometimes drive in a wedge of some kind here.

Jesus makes a further deduction: the person who divorces and remarries commits adultery. Had he simply taught that no person should divorce and remarry, the theory and perhaps the practice of the Western tradition regarding divorce would probably have been very different. From a legalistic point of view, the text seems to imply that a man who has divorced his wife is really still married to her. Under these circumstances, a second marriage may be invalid, and thus not so much prohibited as impossible. Note that deeming remarriage to be adultery presupposes that marriage involves coitus, since adultery is an extra-marital *sexual* relationship.

One should not suppose that Jesus' words in themselves determined the Western Church's strict prohibition of divorce and remarriage. The command "you shall not kill" did not abolish war. It is questionable whether one should interpret what Jesus said as a law prohibiting divorce and remarriage. Besides, the Church has made exceptions and concessions in the application of divine precepts. As Henri Crouzel has pointed out, while the Western Church rigorously applied Jesus' condemnation of divorce and remarriage in Matthew 5:31–32, the Church failed to apply his categorical prohibition of oaths in Matthew 5:33–37. On the contrary, "not only has the Church always allowed oath-taking in public and private life, but she has often condemned those who deny its liceity, and she has imposed oaths upon members of the clergy, recognizing in so doing that she lives in a world where 'evil'—that is, falsehood—still exists, even though the ideal of the kingdom entails absolute sincerity."<sup>13</sup> Moreover, Augustine, as we shall see, had considerable difficulty squaring the doctrine of indissolubility with the apparent implication of the exceptive clause in Matthew (since this seems to suggest that a man who has divorced his wife for adultery may remarry). In any case, the strict regime that became normative in the West probably did not become established until the late fourth century. Hitherto, the field was still open. The historian of doctrine must ask why and as a result of what trends of thought the Western Church applied this text so literally and so strictly.

Matthew's version of Christ's instruction on divorce adds an exceptive clause about *porneia* ("unchastity"): "He who divorces his wife, except for unchastity, and marries another commits adultery."<sup>14</sup> The word *porneia* in this passage, which became *fornicatio* in the Latin versions, was universally understood from the early patristic period to denote adultery (an interpretation that has few adherents among modern commentators). What kind of exception did Jesus make? And does the exception apply to the wife of an adulterer as well as to the husband of an adulteress? Matthew's version of Jesus' discourse (unlike Mark's) does not envisage the possibility of women divorcing their husbands, so that the exception perhaps applies

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<sup>13</sup> H. Crouzel, *L'Église primitive face au divorce* (1971), p. 33 (my translation).

<sup>14</sup> Matt. 19:9. See also Matt. 5:32. There is no parallel in the corresponding passages in Luke, Mark and 1 Cor. 7.

only in the case of men divorcing women. Moreover, St Paul, reaffirming the Lord's teaching that a man should not leave his wife and that a wife should not leave her husband, adds that a woman who does separate from her husband should remain unmarried, but says nothing in this regard about the man who separates from his wife (1 Cor. 10–11).

*The Letter to the Ephesians*

The fifth chapter of Ephesians transformed and as it were inverted a traditional theme that had first appeared in Hosea: namely, that of the marriage between God and his people.<sup>15</sup> In the New Testament, Christ becomes the bridegroom.<sup>16</sup> In these cases, the familiar example of marriage illustrates how God or Christ is related to his people. The author of Ephesians, on the contrary, uses the union between Christ and the Church to illumine marriage, although this discourse turns around in such a way that it also illuminates Christ's union with the Church. Wives should be subject to their husbands as the Church is subject to Christ. Husbands should love their wives as Christ loved the Church, for he sacrificed himself for her. Husbands should love their wives as their own bodies, even as Christ loves the Church, which is his body. Here the author quotes Genesis 2:24: "For this reason a man shall leave his father and mother and cleave unto his wife and they shall be two in one flesh." He adds: "This mystery is a great one, and I am saying that it refers to Christ and the Church."<sup>17</sup> The Greek text speaks of a great *mystêrion*: that is to say, a truth about Jesus Christ that was once hidden but has at last been revealed. The mystery to which the author refers may be either the text of Genesis 2:24 itself or the union between Christ and the Church. Several translations of the final phrase (*eis Christon kai eis tèn ecclesian*) occur in the various Latin versions, and the interpretation of the text depended to some extent on its precise grammatical form.<sup>18</sup> The word *mystêrion* in this verse was usually translated by *sacramentum*. By Augustine's time, the term

<sup>15</sup> The theme also appears in Isa. 50:1 and 62:4–5, Jer. 2:1–2 and Ezek 16.

<sup>16</sup> E.g. John 3:29, Mark 2:19, Matt. 22:1–4 and 25:1–13, 2 Cor. 11:2, Apoc. 19:8–9 and 21:9 ff.

<sup>17</sup> Eph. 5:32 (RSV).

<sup>18</sup> Tertullian has *in Christum et ecclesiam*. Augustine and the Vulgate have *in Christo et in ecclesia*. For the variants, see *Vetus Latina* 24.1 (1962–64), pp. 258–62.

“sacrament” had acquired a range of powerful senses and connotations, although its meaning was still far from determined and settled. This accident of translation conditioned the Christianization of marriage in the West.

The reference in Ephesians to Genesis 2:24 showed that one might regard the latter dictum as a prophecy, and other elements in the story of how God formed Eve as Adam’s wife lent themselves to typological interpretation. Who uttered the original dictum? It was Adam who observed, “This is bone of my bone and flesh of my flesh” and so on, but the verse that follows (i.e., Gen. 2:24: “for this reason a man shall leave his father and mother and cleave unto his wife and they shall be two in one flesh”) seems to be an editorial gloss. As we have noted, Jesus himself attributed it to God (Matt. 19:4–5). The Fathers were aware of this, but they attributed it both to God and to Adam because Adam was speaking as a prophet. All these considerations came together to confirm that the first marriage, which Jesus treated as the norm for all marriage, was a type of the union that the Passion would make between Christ and the Church.

#### *The First Letter to the Corinthians*

The Hebrew Bible treats procreation as a duty to God (what Augustine calls an *officium*) and progeny as a blessing, a gift from God. Contrariwise, it treats sterility as a curse. When God first made man and woman in his own image, he blessed them and said to them, “Increase and multiply, and fill the earth.” God repeated this blessing after the flood when he blessed Noah and his sons, commanding them to increase and multiply and reminding them that he had made man and woman in his own image (Gen. 9:1, 6–7). God promised to Abraham that he would bless him with a myriad descendants (Gen. 22:17), and Rebekah’s family betrothed her to Isaac with the blessing “be the mother of thousands of ten thousands” (Gen. 24:60). Rebekah proved to be barren at first, but she conceived after Isaac prayed to the Lord (25:21). Thus her fruitfulness was an answer to prayer and a gift from God. The Psalmist likewise treats progeny as one of the greatest of God’s blessings (see, for example, Ps. 126/127:3–5 and 127/128:3–4).

The New Testament, on the contrary, seems to prize virginity. Jesus himself was a virgin, as were both his precursor (John the Baptist) and his mother. Virginity is incompatible with procreation in all but one unique instance. Jesus called men



away from their families and from domestic life. Thus he said to his disciples, "Truly, I say to you, there is no man who has left house or *wife* or brothers or parents or children, for the sake of the kingdom of God, who will not receive manifold more in this time, and in the age to come eternal life."<sup>19</sup> Such is the vocation of those who have "made themselves eunuchs for the sake of the kingdom of heaven" (Matt. 19:12).

This difference suggested to the Fathers that the era in which procreation was an obligation had passed. What, then, is good about marriage now? Is it good for unmarried Christians to marry and for widowed Christians to remarry? Should married Christians renounce conjugal relations and live as if they were unmarried? St Paul provided the answers to these questions in 1 Corinthians 7.

Paul clearly inclines to the view that "it is well for a man not to touch a woman,"<sup>20</sup> but while preferring celibacy and continence, he advocates marriage as a concession made in view of human infirmity and as a solution to the problems that frustrated sexual desire may cause. It is better to marry than to burn (v. 9). Thus sexual intercourse within marriage is not only permitted but advisable. Each spouse has power over the body of the other, and each owes the conjugal debt to the other. Spouses may abstain in order to devote themselves to prayer, but they should do so only by mutual agreement and only for a little while, lest Satan take advantage of their frustrated sexual appetites (vv. 3-5). It is striking that Paul's way of justifying marriage and sexual relations within marriage makes no reference to procreation. Paul assumed that the Parousia was imminent. This world would soon come to an end, and a vigil for Christ's return had already begun (see vv. 26 and 29). Paul's sense of eschatological urgency remained in the minds of the Fathers at least until the late fourth century.

As well as justifying marriage as a solution to the problem of sexual desire rather than as the means to procreation, Paul's discourse provided the Fathers with a way of situating marriage

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<sup>19</sup> Luke 18:29-30 (RSV).

<sup>20</sup> 1 Cor. 7:1 (RSV): "Now concerning the matters about which you wrote. It is well for a man not to touch a woman." The verse might be punctuated thus: "Now concerning the matters about which you wrote: [namely, that] it is well for a man not to touch a woman." In other words, Paul was probably citing the opinion of some of the Corinthians, which he found too severe. The Fathers, however, assume that Paul himself proposed this.

in the scale of Christian values. For he writes (v. 38) that "he who marries his betrothed does well and he who refrains does better" (RSV). Although it has never been clear exactly what this verse means or even how one should translate it, the model that it suggests is clear enough: marriage is good, but celibacy is better.

While these sources offered many possibilities for theological reflection and interpretation, three principal themes stand out. The first is Jesus' teaching that marriage is a permanent relationship because God joined husband and wife in the beginning, causing them to be two in one flesh, so that a person who divorces and marries again commits adultery. The second is the teaching of the Letter to the Ephesians (which was ascribed to St Paul until modern times) that the union between Christ and the Church provides the model which husbands and wives should seek to emulate in their own marriages. This discourse also provides a Christological perspective from which one may understand marriage as part of the Christian life. Moreover, it associates marriage with a "sacrament" pertaining to Christ and the Church. The third idea is Paul's justification of marriage as a solution to the problem of sexual desire. In Augustinian terms, this means that marriage is a remedy for the sickness of concupiscence.

I stress the mutual distinctiveness of these three elements, for I shall argue that in the Western tradition, the first of them subordinated and displaced the second, and perhaps the third as well.

### *Prospectus*

This book is divided into four parts.

Part I treats marriage in Roman and in Germanic law. These systems of civil law made up the context for the Christian conception and regulation of marriage in the West. The Church inevitably adopted much of the Roman law of marriage, but the Latin Fathers considered that in some respects, especially those pertaining to the dissolution of marriage, it represented an all too human understanding of marriage. In this way, the Christian conception of marriage developed in contradistinction to civil law. This raises a question that is perennial in the study of Roman law after Constantine: namely, to what extent did Christianity influence Roman law itself (in this case, the laws on marriage)? When the Latin Fathers maintained that the Roman law of marriage was *lex humana*, as opposed to the

*lex divina* to which they adhered, they were making a theological distinction, and not a sociological distinction between Church and State. Theodosius and Justinian would not have considered their own marital legislation to be *merely* secular and not Christian. Similar questions arise regarding Germanic law, although here the story is more complicated.

It is useful for our purposes to note some of the particular laws relating to marriage in the Roman and Germanic systems, but it is more important to discover the general principles involved and the implied concepts of marriage, and thus to establish in due course how these principles and concepts differed from those of the Western Church. There are some serious problems that one must face here. The rationale that underlies particular laws on marriage remains to a considerable extent obscure and controvertible. Also obscure and controvertible are such matters as the degree to which the various Germanic codes share a common basis, the extent of Roman influence on Germanic law, and the constitution of vulgar Roman law during the early Middle Ages. These are reasons for first treating civil law on its own, rather than introducing the relevant aspects piecemeal as we go along. It is important that one should form as clear a picture as possible of these systems of thought and judgment, and also that the author should betray his own presuppositions.

In Part II, we turn from civil to ecclesiastical law. The first two chapters in this part (chs 5 and 6) concern the distinction made by the Latin Fathers between the human law and the divine law (*lex divina*) of marriage. The distinction pertained above all to indissolubility, which churchmen saw as the salient and distinguishing feature of the Christian doctrine of marriage. In the case of divorcees who remarried, the Church would declare invalid a marriage that was valid in civil law. I shall argue that the notion of a divine law of marriage was central to the Christianization of marriage in the West. Chapter 7 concerns the Christian response to the question of whether there could be a valid marriage between a free and a servile person, and it raises the question of whether the Church ever declared valid a marriage that was invalid in civil law. Chapters 8 and 9 examine the manner in which the Fathers and ecclesiastical legislators interpreted the exceptive clause in Matthew ("except for fornication"). Chapter 10 considers the way in which churchmen reasoned that spouses had the right to separate permanently to devote themselves to the

religious life, and how they may have squared this with the doctrine of indissolubility. These chapters show how the theory of indissolubility and the notion of the marriage bond (the *vinculum*) developed, and how bishops and theologians understood them.

Part III is devoted to Augustine's theology of marriage, and to his theory that marriage is good because of its three benefits: fidelity, progeny and sacrament. The tradition of theological reflection upon marriage, which had begun in 1 Corinthians 7 and Ephesians 5, had continued in Tertullian and, to a lesser extent, in Jerome and Ambrose. Nevertheless, no Latin theologian during the patristic and medieval periods wrote as extensively or thought as deeply about the nature and purpose of marriage as Augustine did. No one else was as influential. After Augustine, there was no inquiry of comparable scope and depth until the high Middle Ages, when his ideas and sayings about marriage became the basis of speculation about marriage as one of the seven sacraments.

The only author in the intervening period who inquired in any depth into the nature of marriage was Hincmar of Reims (d. 882), whose importance will become manifest in Part IV. Hincmar's inquiries into marriage arose out of his attempts to reach and to argue for correct judgments in difficult and painful matrimonial cases. His treatment is much less extensive than Augustine's, and it is less systematic, less coherent and less elegantly presented. Nevertheless, it reveals both an inquiring spirit and a remarkable familiarity with Augustine's own writings on the subject. Hincmar's chief contribution to later developments lies in his attempt to incorporate sexual consummation into Augustine's *sacramentum*.

In Part IV, we turn from the nature and function of marriage to the nuptial process: that is, to the manner of *becoming* married. Thus we shall consider the nuptial process in the Frankish Church and Christian thinking about betrothal, consummation and nuptial benediction.

PART ONE

MARRIAGE IN CIVIL LAW



CHAPTER ONE

ROMAN LAW:  
THE FORMATION AND NATURE OF MARRIAGE

*Betrothal*<sup>1</sup>

*The classical model*

A betrothal (*sponsalia*) was a public agreement to marry in the future (*Dig.* 23.1.1). Thus its essential constituents were a mutual promise and an announcement. The jurist Ulpian explains that the word *sponsalia* comes from *spondere* (“to promise”), and that “our forefathers were accustomed to stipulate and promise for themselves wives-to-be” (*Dig.* 23.1.2).

Betrothal was not a necessary first step to getting married, and whether or not betrothal had gone before was a matter of complete indifference as far as the validity of a marriage was concerned (cf. *Dig.* 23.1.9 and 24.1.32.27). In the early Republic, betrothals were made by solemn promises (called *sponsa* or *sponsiones*) between a man or his *pater* on one side and a woman’s *pater* or tutor on the other. The promise was in effect a verbal contract, and it was probably actionable. When free marriage became the norm, betrothals became informal and were not actionable. Either partner could renounce the engagement. We learn from Gaius that the dissenting partner need only make a simple renunciation, and that the accepted formula was “*condicione tua non utor*,” which we might loosely translate as “I do not abide by your terms” (*Dig.* 24.2.2.2). A constitution from AD 293 determined that a woman who had been betrothed to one man was not prohibited from leaving him and marrying another.<sup>2</sup> The agreement (*consensus*) that made marriage was theoretically distinct from the agreement that made betrothal. It is not clear that an exchange of consent was a customary part of the marriage ceremonies, although

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<sup>1</sup> See S. Treggiari, *Roman Marriage* (1991), pp. 125–160. See also P. E. Corbett, *The Roman Law of Marriage* (1930), pp. 1–23; A. Watson, *The Law of Persons* (1967), pp. 11–18; J. F. Gardner, *Women in Roman Law and Society* (1976), pp. 45–47; and J. Gaudemet, *L’Eglise dans l’Empire Romain* (1958), pp. 521–24.

<sup>2</sup> *Cj* 5.1.1: “*Alii desponsata renuntiare condicioni ac nubere alii non prohibetur.*”

in the case of marriage by proxy, when the agreement of an absent man was signified in a letter, agreement was the crux of the proceedings. What established the existence of a true marriage in law, however, was a settled intention to be married, and a mere promise to marry could not provide this. When a betrothed couple became married, therefore, the accord upon which the marriage was established went beyond the promises that constituted the betrothal. In this respect the Roman betrothal differed somewhat from that of the Germanic tribes and from that of the Western Church, both of which tended to regard the betrothal as the occasion upon which the consensual aspect of a marriage was established.<sup>3</sup>

A simple agreement, without formality, ceremony or added stipulations, was all that the law required for betrothal, and neither witnesses nor written testimony were necessary.<sup>4</sup> Paul considers the case of a step-brother and step-sister whose betrothal had been arranged by their respective mother and father. The parents had attached a financial penalty to the agreement, should it fail to be fulfilled. In due course, the step-sister refused the match. In Paul's judgment, the stipulation need not hold because adding it to the agreement to marry was not honourable (it was not *secundum bonos mores*). He explains that one should not fetter a marriage in this way (*Dig.* 45.1.134, pr.).

As might be expected, the required consents were in principle the same as those for marriage (*Dig.* 23.1.7.1 and 23.1.11), which we shall consider in due course. Suffice to say here that what was necessary for marriage was the agreement of the partners themselves and also (if they were *alieni iuris*) of those who had power over them, namely their *patres*. Corbett argues that under classical and later law a father could not betroth his son, even a *filius familias*, against latter's will, but that the evidence leaves some doubt about the rights of a daughter in power.<sup>5</sup>

Although a betrothal was merely a promise to marry, it carried with it some of the consequences of being married. Thus a betrothal created impediments of relationship that were equivalent to affinity. A father could not marry his son's former

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<sup>3</sup> See J. Gaudemet, "L'originalité des fiançailles romaines," *Sociétés et mariage* (1980), 15-45; and *idem*, "Originalité et destin du mariage romain," *ibid.*, 140-84, esp. pp. 159-63.

<sup>4</sup> *Dig.* 23.1.7. Ulpian, in *Dig.* 23.1.4, writes: "Sufficit nudus consensus ad constituenda sponsalia."

<sup>5</sup> See Corbett, *The Roman Law of Marriage*, pp. 2-5.



fiancée, for example, nor a son his father's former fiancée (*Dig.* 23.2.12.1–2). Similarly, a man could not marry the mother of his former fiancée because she was considered to have once been his mother-in-law (*Dig.* 23.2.14.4).<sup>6</sup> A rescript by Septimius Severus, recorded by Ulpian, determines that a man may prosecute his fiancée for adultery since violating the expectation of matrimony as bad as violating matrimony itself.<sup>7</sup>

In other respects, betrothal and marriage were clearly differentiated by their legal consequences. We may note four examples. The first concerns the statutory period of mourning during which a widow was prohibited from remarrying. (Under Imperial legislation the period was one year.) If she did marry again within this period, she incurred *infamia* and severe financial penalties,<sup>8</sup> but the law did not require a woman to mourn her fiancé. If he died, she could marry another man immediately (*Dig.* 3.2.9.1). Second, the law did not prohibit gifts between the betrothed. Third, while a freedwoman who had been married to her patron could not remarry without her patron's permission (*Dig.* 23.2.45.1), this rule did not apply to betrothal. Therefore if she was merely betrothed to her patron, she could break off the engagement and marry another without his consent (*Dig.* 23.2.45.4). Fourth, children could become betrothed before marriageable age. Modestinus says, "in contracting a betrothal the age of the parties is not defined, as it is for marriage. Accordingly a betrothal can be made from early infancy" (*Dig.* 23.1.14).<sup>9</sup> In the *Digest*, the text continues: "provided that both persons understand what is being done; that is, that they are not less than seven years old." This was probably added by Justinian's compilers, for it clearly contradicts what has gone before.<sup>10</sup>

<sup>6</sup> These are impediments of "quasi-affinity" in medieval canon law.

<sup>7</sup> *Dig.* 48.5.14.3: "... quia neque matrimonium qualecumque nec spem matrimonii violare permittitur." See also 48.5.14.8. On the crime of adultery and its penalties, see Corbett, pp. 127–46, and Gardner, pp. 127–31. Only married women and their paramours could be prosecuted. In other words, a man could be prosecuted for adultery only on the ground that he had had a sexual relationship with another man's wife, and it did not matter whether the *adulter* himself was married or not.

<sup>8</sup> A constitution of AD 381 raised the *tempus lugendi* from ten months to one year (*Cod. Theod.* 3.8.1, = *CJ* 5.9.2). A woman breaking this rule was to be disgraced and to lose all the property she had acquired from her husband, including betrothal gifts and anything left to her in his will.

<sup>9</sup> Similarly *Pauli sent.* II.19.1: "Sponsalia tam inter impuberes contrahi possunt."

<sup>10</sup> See Corbett, pp. 2–4.

As with marriage, ceremonial aspects were common, but they were not legally necessary. The man would place a ring upon the appropriate finger of his fiancée as a token (*pignus*) of intent, and he might also present her with gifts. From the second century AD, the ring was regarded as an *arrha*: that is to say, as a pledge of intent.<sup>11</sup> The practice seems to have come from the world of commerce, for in a text from Ulpian we find references to both a sum of money and a ring being presented as *arrahae* in business transactions (*Dig.* 19.1.11.6; cf. 19.5.17.5).

*Betrothal under the Christian emperors*

Legislation of the Christian Empire refers to the practice of bestowing the *arrha sponsalicia* as an earnest of intent.<sup>12</sup> The practice was Eastern in origin. This *arrha* was usually a sum of money, and the man gave it to his *sponsa* or to her representative or parents. If the betrothal was broken off by mutual agreement or with good cause, or if some necessity such as the death of one the partners terminated the betrothal, the *arrha* would be returned, but it provided a way of penalizing someone who broke off the betrothal unilaterally without good cause. If a woman spurned her suitor and married another, the *arrha* would be repayed fourfold. If a man simply refused to marry his betrothed, or if he had failed to fulfil his promise after two years, then the woman was free to marry another and she retained the *arrha*.<sup>13</sup>

The practice of making betrothal gifts was congruent with a degree of formality and legal consequence that became attached to betrothal in the law of the Christian emperors. Like the counter-dowry, the *arrha sponsalicia* was a Greek custom, and it is not clear how widespread it was in the Latin world. It is difficult to determine whether Eastern elements that begin to appear in legislation from the third century AD reflect developments within Roman law or simply the fact that, after the extension of citizenship in 212 AD, Roman law became "vulgarized" as it had to take account of local Eastern practices. The legislation of the Theodosian code regarding the *arrha sponsalicia*, however, appears in the Roman codes both of the

<sup>11</sup> L. Anné, "La conclusion du mariage," *Ephemerides Theologicae Lovanienses* 12 (1935), pp. 526–28.

<sup>12</sup> See *ibid.*, pp. 518–23.

<sup>13</sup> *Cod. Theod.* 3.5.4–5 and 3.5.11. *CJ* 5.1.3, 5.1.5 and 5.3.15–16.

Visigoths (that is, Alaric's *Breviary*) and of the Burgundians.<sup>14</sup>

Betrothal in imperial law remained less formal than its Germanic equivalent. As we shall see, dotation (in this case a gift from the suitor to his wife-to-be) was an essential component of betrothal in Germanic law. Moreover, the Germanic codes emphasize formalities such as petition and the presence of witnesses. Unfortunately, we do not know the position of West Roman vulgar law on this matter.

There was a tendency among some of the Latin Fathers to treat betrothal as marriage. Augustine, for example, points out that Scripture calls Mary "wife" from the moment of her betrothal ("coniux vocatur ex prima desponsationis fide").<sup>15</sup> The Frankish Church during the Carolingian period generally adhered more to Roman than to Germanic norms, but here dotation was an integral part of betrothal. Frankish rulers and churchmen added formalities to the process leading from betrothal to marriage, for example by stipulating that there should be an official inquiry into the relationship of the *sponsus* and *sponsa* before they came together.

### *Marriage*

#### *Definitions*

What is marriage? The classical jurists were not inclined to reflect upon the nature of marriage. Roman law merely applied and appealed to certain principles and maxims regarding marriage when it was necessary to determine whether or not a man and his female partner were in fact married or at what point they had become married. From the legal point of view, it was necessary to determine whether a marriage was valid because of its consequences, especially those pertaining to the legitimacy of offspring. The law of marriage, therefore, was chiefly relevant to questions of inheritance and status. The two or three definitions of marriage that are found in Roman law and jurisprudence are merely descriptive and were of no legal consequence.

Marriage is "the union of a man and a woman" (*maris atque feminae coniunctio*) according to a text from Ulpian's *Institutes* (Dig. 1.1.1.3; see also *Inst.* 1.2, pr.). Here Ulpian posits three species of law: *ius naturale*, which is common to all animals;

<sup>14</sup> *Brev.* 3.5.4–6. *Lex Romana Burgundionum* 27.1–3.

<sup>15</sup> *De nuptiis et concupiscentia* 1.11, CSEL 42, p. 224.

*ius gentium*, belonging to mankind; and *ius civile*, consisting of such additions and changes to these laws as are made by Roman legislators.<sup>16</sup> Marriage, albeit a human institution, springs from the the natural law:

The natural law is that which nature has taught to all animals. For this law is proper to all animals and not only to mankind. . . . From this comes the union of a man and a woman that we call matrimony, and the procreation and rearing [*educatio*] of children. (*Dig.* 1.1.1.3)

The text implies, without explicitly affirming, that marriage exists for the procreation and raising of children, an end inscribed in the natural law.<sup>17</sup> Nevertheless, Ulpian does not specify what kind of union of a man and a woman is called marriage.

A formal definition by Modestinus, a pupil of Ulpian, supplies the specific difference: "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio" (*Dig.* 23.2.1).<sup>18</sup> The additional phrases (*consortium omnis vitae, divini et humani iuris communicatio*) have been variously translated, for example: "a partnership for life involving divine as well as human law;" "the sharing of their entire life, the joint participation in rights human and divine;" and "an association for the whole of life, in which the two share the same civil and religious rights."<sup>19</sup> It is clear that husband and wife are considered to become a single social unit. The phrase "omnis vitae" ("of all life" or "of the entire life") probably pertains to the duration of life as well as to its content. It may seem unlikely, in view of the ease with which spouses could divorce each other under classical Roman law,

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<sup>16</sup> Ulpian died ca. AD 223. On this threefold division, see commentary by J. A. C. Thomas in *Institutes of Justinian* (1975), pp. 6–7. The notion of *ius naturale* posited in this text is unusual. According to the usual view, *ius gentium* and *ius naturale* are the same thing: namely, the law suggested by natural reason, for reason itself is common to all races: cf. *Dig.* I.1.9 (Gaius), *Inst.* I.2.11, *Dig.* I.1.6.pr. (Ulpian).

<sup>17</sup> Cicero, in *De officiis* I.4.11, observes that all animals (including human beings) desire to form unions for the sake of procreation and to care for the offspring.

<sup>18</sup> On this definition, see J. Rabinowitz, "On the Definition of Marriage as *Consortium omnis vitae*," *Harvard Theological Review* 57 (1964), 55–56; and J. Huber, *Der Ehekonsens im römischen Recht* (1977), pp. 24–26. Regarding the final clause, cf. *CJ* 9.32.4: "... [uxor] quae socia rei humanae atque divinae domus suscipitur."

<sup>19</sup> Quotations respectively from: *The Digest of Justinian* (1985), p. 657; J. F. Gardner, *Women in Roman Law and Society* (1986), p. 47; and G. H. Joyce, *Christian Marriage* (1933), p. 40, n. 1.

that the dictum meant that marriage was permanent. It is perhaps difficult in any case to square the notion of *consortium omnis vitae*, however interpreted, with the rather slight legal consequences of marriage in Modestinus's time. But the Romans' conception of marriage should not be equated with their law of it. What the law freely permitted may not have met with the approval of society or of the family council, and what was done may have fallen far short of what was considered ideal. The fact that Romans regarded the *univira* (the woman who married and remained faithful to but one man) as the ideal of womanhood suggests that there was at least an ideology of marital permanence.<sup>20</sup> Moreover, divorce was considered to be something that had regrettably crept in but had not belonged to Rome's golden age.<sup>21</sup> Romans would have concurred with Jesus' affirmation that there was no divorce "in the beginning" (Matt. 19:8).

A modified version of Modestinus's definition appears in Justinian's *Institutes*. According to this, marriage is a union between a man and a woman "involving a single, shared way of life" ("Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens").<sup>22</sup> Isidore of Seville's untranslatable definition ("Coniugium est

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<sup>20</sup> Cf. *Inscriptiones Latinae Selectae*, ed. Dessau (1902), vol. 2, n. 8444: "Postumia Matronilla incomparabilis coniux, mater bona, avia piissima, pudica religiosa frugi efficacis vigilans sollicita *univira* unicuba totius industriae et fidei matrona, vixit annis n. LIII mensibus n. V diebus tribus." Similarly nn. 8430, 8450, 8394. The same notion is reflected in Horace, *Odes* III.15, line 5: "unico gaudens mulier marito," referring to Augustus and Livia (although Livia was a divorcee!).

<sup>21</sup> According to Valerius Maximus (II.1.4), the first man to have divorced his wife (it was because of her sterility) was said to have been Spurius Carvilius Maximus Ruga, in the sixth century after Rome's foundation. Tertullian records the same Roman belief and notes that it agrees with Jesus' teaching: see *De monogamia* IX.8, ed. P. Mattei (*Le mariage unique*, SC 343), p. 172. See also Mattei's commentary on this text (*ibid.*, p. 306).

<sup>22</sup> *Inst.* 1.9.1. It is usually this form of the definition, from the *Institutes*, that high medieval canonists and theologians took up. See, for example: Ivo of Chartres, *Decretum* 8.1, PL 161:583D; *Panoramia* 6.1, PL 161:1244D; Gratian, C.27 q.2, dictum ante c.1 (1062); C.29 q.1 (1091); Alexander III, X 2.23.11 (355); *Sententiae Magistri A*, ed. H. J. F. Reinhardt, *Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters* NF 14 (1974), p. 167; Hugh of St Victor, *De sacramentis*, II.11.4, PL 176:485C; Peter Lombard, *Sent.* IV.27.2, Grottaferrata edition, vol. 2, 1980, p. 422, and *Tractatus de coniugio*, n. 2, *ibid.*, p. 84\*. See also J. Gaudemet, "La définition romano-canonique du mariage," in *Speculum Iuris et Ecclesiarum* (1967), 107-14. Gaudemet notes examples in the decretal collection *Britannica* (late 11th cent.), the *Summa* of Rufinus, Alexander III (cited in the *Compilatio prima*),

legitimarum personarum inter se coeundi et copulandi nuptiae”) comes from the same stable.<sup>23</sup>

Ancient definitions of marriage tell us very little about the nature of marriage in Roman law or about what marriage was in the minds of legislators and jurists. To discover what marriage in Roman law was, therefore, we need to consider the matrimonial laws and the assumptions that legislators and jurists made about marriage and applied to particular cases.

### *The effects of marriage*

One approach to answering the question “what is marriage?” is to consider what are the consequences of getting married. In other words, what difference does being married make?

It should first be emphasized what Roman marriage did not do. By the time of Christ’s advent, Roman marriage was such that a wife was not strictly in the same family as her husband. In the ancient forms of marriage, which had involved the transfer of *manus*, a woman was transferred from her own family into her husband’s, but *manus*-marriage, while still common in the second century BC, was disappearing at the beginning of the Christian era, and was long gone by the time of Justinian. To appreciate the nature of Roman marriage, therefore, it is necessary to bear in mind the nature of the traditional Roman family. Moreover, the peculiar nature of free marriage (that is, marriage without the transfer of *manus*) is best understood against the background of the ancient, more formal kinds of marriage that it superseded.

In classical usage, the word *familia* denoted strictly all those persons and even all things which were under the power of the same *pater familias*. The *pater* himself, therefore, was strictly not part of the family but its ruler. The family encompassed his legitimate descendants and those who had joined them either through adoption or (in the case of women) through *manus*-marriage, as well as slaves.<sup>24</sup> All children born legitimately (that is, the issue of *matrimonium iustum*) came under the paternal power (*patria potestas*) of their father from birth, but he owed his power to his father, as long as the latter sur-

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and the *Decretals* of Gregory IX, as well as in Ivo and Gratian. He points out that Stephen of Tournai quotes the version of Modestinus (i.e. *Dig.* 23.2.1).

<sup>23</sup> *Etym.* IX.7.20, ed. M. Reydellet (Paris, 1984), p. 233 (= *PL* 82:366B).

<sup>24</sup> On the various senses of *familia*, see Ulpian in *Dig.* 50.16.195. See also D. Herlihy, *Medieval Households* (1985), pp. 2–4.

vived. Although one may usually translate the word *pater* in Roman law by "father," strictly speaking one should say that the family's *pater*, who held power over his descendants, was its oldest surviving male ascendant. The descendants of the *pater*, including those who entered the family by adoption, were legally dependent on him and were in his power (they were *alieni iuris*). They might, however, become independent (*sui iuris*), for example by emancipation. When the *pater* died, each of his immediate descendants became *sui iuris*, and thus every immediate male descendant became *pater* in relation to his own descendants.

The relationship of agnation, therefore, was of more consequence in law than that of cognation or blood relationship.<sup>25</sup> Agnation was a function of the transmission of paternal power through the male line. All those who, whether by birth or adoption, were descendants in the male line from the same *pater*, and who thus either were or (if he was deceased) would have been in his power, were agnates. While all the agnates might be said to belong to the same family, the family properly so called included only those who were in the power of a living *pater* (*Dig.* 50.16.195.1-2).

At one time paternal power may have been virtually unrestricted.<sup>26</sup> Descendants of the *pater* who were under his power could own no property of their own, and whatever they acquired became his property. In the early Republic, a *pater* was legally empowered to marry off his sons and daughters, to give them in adoption, and in theory even to sell them, and he was said to have the right to take his offspring's life (*ius vitae necisque*), although this right may not have extended beyond infanticide. These powers waned in the course of the Empire, first in practice and then in law.<sup>27</sup>

While *patria potestas* was the power of the head of a family over those who were dependent on him through birth or adoption, *manus* was the power that might be held by a husband over his wife.<sup>28</sup> Thus a woman who was *in manu* to her husband

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<sup>25</sup> Herlihy argues that in late Latin usage and especially in Christian writings, the word *familia* "assumed connotations of blood descent": see *Medieval Households*, p. 3. This development was probably related to the waning significance of *patria potestas* during late antiquity.

<sup>26</sup> See Watson, *The Law of Persons*, pp. 98-100.

<sup>27</sup> See Gardner, pp. 6-11, and Thomas, *Textbook of Roman Law*, pp. 414-15.

<sup>28</sup> On the terms *potestas* and *manus*, see Watson, *Rome of the XII Tables* (1975), pp. 47-51.

was under his power, if he was *sui iuris*, or under the power of his *pater*. Her legal status in relation to her husband was considered to be equivalent to that of a daughter, so that she became effectively his agnate. While *manus* was not in every respect the same as paternal power, a wife *in manu* could hold no property of her own. Anything she owned or acquired became the property of her husband or of his *pater*. By entering into *manus*, a woman who was *alieni iuris* ceased to be in her *pater's* power and thus left one agnatic family and entered another. The theory that *manus*-marriage descended from a primitive, Indo-Germanic system of brideprice, in which the wife would be bought as a chattel,<sup>29</sup> is romantic and speculative. Jack Goody has expressed considerable scepticism about theories of this kind in regard to Germanic marriage.<sup>30</sup>

A woman entered *manus* by one of three ways, namely by *usus*, *confarreatio* or *coemptio*. All three were probably listed in the XII Tables (the earliest code of Roman laws, issued ca. 450 BC).<sup>31</sup> *Confarreatio* involved a religious ceremony, and was named after the cake of spelt (*far*) that was included in a sacrifice to Jupiter. *Coemptio* was a notional or fictional sale of a woman to her husband. In *usus*, a wife became *in manu* to her husband by virtue of having lived with him for one year. She could thus avoid *manus* by staying away from him for three nights in the year, and avoid it indefinitely by repeating this every year. It is difficult to determine, and perhaps pointless to speculate, whether the transferring of *manus* was in itself the process of getting married, or, on the contrary, something in addition to getting married.<sup>32</sup> Be this as it may, the existence of the "three nights" rule suggests that marriage normally involved the transfer of *manus*.

<sup>29</sup> Cf. Corbett, *The Roman Law of Marriage*, pp. 1, 11, 69, 79, 81.

<sup>30</sup> *The Development of the Family and Marriage in Europe* (1983), pp. 240 ff.

<sup>31</sup> See Watson, *Rome of the XII Tables* (1975), pp. 9–19.

<sup>32</sup> Corbett, in *The Roman Law of Marriage* (1930), p. 68, argues that "marriage and *manus* were originally not distinct concepts but one and the same," and that the "legal forms of marriage were identical with the forms for the creation of *manus*." A similar account is given in E. Schillebeeckx, *Marriage*, vol. 2 (1965), pp. 4–17 (pp. 233–43 in the one-volume edition). On the contrary, Gardner, in *Women in Roman Law and Society* (1986), p. 27 (n. 26) and p. 12, argues that "*manus* and marriage were separate and distinct from the earliest times" and that "the performance of *manus*-ceremonial was not essential to constitute legal matrimony." For a judicious and somewhat sceptical treatment of this issue, see Watson, *XII Tables* (1975), pp. 17–19.



The practice of free marriage—that is, marriage without *manus*—had become the normal arrangement by the time of the late Republic. In itself the fact that a marriage was free in this sense did not entail that the wife was any more at liberty than under *manus*-marriage. Persons who were *alieni iuris* still required paternal consent to get married. Moreover, when a woman who was *alieni iuris* entered free marriage, she remained in the power of her *pater*. By marrying in this way, a woman would not, strictly, become a member of her husband's agnatic family, nor commit herself to a new power. The other peculiarity of free marriage was its informality. While there were customary ways to get married, these had little legal significance. Marriage, as some scholars have put it, was social fact.

Free marriage, therefore, had little effect on the spouses themselves above and beyond the fact that they lived together.<sup>33</sup> Its effects pertained primarily to the children who issued from the union, for they were in their father's power from birth and, as his agnates, had rights of intestate succession. Of course, a woman's entry into free marriage did have some legal consequences for her. She took her husband's rank in society, for example, so that if he was of consular rank, so would she be. Again, her domicile (that is, her legally recognized place of residence) was that of her husband, and similarly she was in law a resident (*incola*) of his municipality, to which she owed her municipal duties.<sup>34</sup> Being married, however, did not legally entail much in the way of obligations between the spouses. For example, a wife had no legal claim upon her husband for maintenance. Although she would probably have received a dowry from her family and perhaps also a nuptial gift from her husband, there was usually no legal requirement that she should be so endowed. In principle, there were no rights of intestate succession between the parties to a free marriage, since they were not agnates, although some provisions were made (*Dig.* 38.11; *Inst.* 3.9.3–7; *Nov.* 53.6, 117.5). By definition, the wife in a free marriage was not under the power of her husband (although by convention she was expected to obey him). If she were *alieni iuris* before the marriage, and thus in the power of her *pater*, she remained so after it. If she were

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<sup>33</sup> See Corbett, pp. 107–46, and J. F. Gardner, *Women in Roman Law and Society* (1986), pp. 67–80.

<sup>34</sup> See Corbett, pp. 112–13.

*sui iuris*, she would be under the guardianship of a tutor, and would remain so when she married.<sup>35</sup>

Roman law prohibited husband and wife from bestowing gifts upon each other (*Dig.* 24.1), although there were exceptions to this rule.<sup>36</sup> This was one reason why the question of the validity of marriage arose in Roman law, for a valid marriage would make gifts between the partners invalid. Ulpian explains that the prohibition was made lest spouses, motivated by their love to act intemperately, should impoverish themselves by bestowing lavish gifts upon one another (*Dig.* 24.1.1).

Husband and wife were supposed to treat each other with a conjugal regard that is variously described as *reverentia* (*Dig.* 23.3.14.1), *reverentia maritalis* (*CJ* 5.13.1.7), *affectio et pietas* (*Dig.* 32.41) and *maritalis honor et affectio* (*Dig.* 39.5.31). Corbett argues that although no-one could be made to observe the debt of conjugal reverence, it was an important matter of legal principle.<sup>37</sup> For example, this is arguably why husband and wife could not institute penal or defaming actions against one another (*CJ* 5.21.2, *Dig.* 25.2.2). Moreover, when the Christian emperors determined what were the legitimate grounds for divorce and introduced penalties for those who divorced without good cause, infringements against proper conjugal respect were among the accepted grounds for repudiation. Theodosius II, for example, determined in AD 449 that a wife may repudiate her husband if he brings immoral women into the home, threatens her life or flogs her (*CJ* 5.17.8.2). Justinian ruled that a husband's battering of his wife did not constitute grounds for divorce (*Nov.* 117.14), but this probably reflects greater stringency regarding the permanence of marriage, and not a relaxation regarding the obligation to show conjugal reverence.

While Roman law presupposed that marriage was in essence a sharing of the whole of life and that spouses should treat each other with marital affection, it neither defined such things nor treated them as legal obligations. Marriage was treated as if it were a *de facto* condition that, once identified as such, had certain legal consequences. In other words, it was not being married *per se* but the consequences of being married that

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<sup>35</sup> In the Empire, there were ways whereby a wife could be released from this requirement, including the *ius liberorum*, by which she could be released if she had begotten three children. See Gardner, *Women in Roman Law and Society* (1986), pp. 20–22.

<sup>36</sup> See Corbett, pp. 114–17.

<sup>37</sup> *Ibid.*, pp. 125–26.

were a matter of right (*ius*) and came under the purview of the law.

### *Marriage and procreation*

What is marriage for? An alien who came to observe the human race would soon notice that marriage has something to do with the begetting and raising of children. It was generally presupposed in classical times that marriage existed for the sake of the procreation and education of children, and this supposition occasionally manifested itself in Roman legislation and jurisprudence.<sup>38</sup> Following the Augustan legislation contained in the *lex Iulia de maritandis ordinibus* (18 BC) and *lex Papia Poppaea* (AD 9), unmarried and childless persons were penalized, while certain privileges and dispensations were granted to those who had borne three legitimate children.<sup>39</sup> The aim of these provisions was to discourage concubinage, for the offspring of a man and his concubine were by definition illegitimate and not his heirs. The *ius trium liberorum* freed the mother who had begotten three legitimate children from the requirement to have a guardian (*tutela*), while it granted preferment in the matter of magistracies to the father. The most significant penalties pertained to testamentary succession: childless persons could only inherit half of what had been left to them, while unmarried persons could only inherit from those related to them by marriage or by blood within seven degrees. Constantine, however, repealed the penalties for childlessness in AD 320 (*CJ* 8.57.1). Was he motivated by the Christian consideration that the "time to embrace" had passed and the era of virginity had begun?

Majorian declared in a novel of AD 458 that he cared zealously for the welfare of children and wished that they should be procreated abundantly for the advancement of the name of Rome.<sup>40</sup> The Latin Fathers, on the contrary, considered that the time for generating children had passed. Tertullian and Jerome thought that the world was already too full, and

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<sup>38</sup> See J. Gaudemet, "Les legs du droit Romain en matière matrimoniale," *Sociétés et mariage* (1980), pp. 344–45; and cf. J. Gaudemet, *L'Église dans L'Empire romain* (1958), pp. 518–19 and 535. Procreation was supposed to be the natural reason for sexual intercourse. On the Stoic affirmation of this thesis, see J. T. Noonan, *Contraception* (1965), pp. 46–49.

<sup>39</sup> See Noonan, *ibid.*, pp. 20–25; Corbett, pp. 120–21; Gardner, p. 20.

<sup>40</sup> Maj. Nov. 6.9: "Et quia studiose tractatur a nobis utilitas filiorum, quos et numerosius procreari pro Romani nominis optamus augmento. . . ."

Augustine seems to have thought that Heaven itself was nearly full.<sup>41</sup>

That marriage exists for the sake of procreation may be the premise of rulings pertaining to marriage and potency. Certainly it was assumed that persons should be able to have sexual intercourse if they were to marry. A boy could not marry before he was *pubes* nor a girl before she was *viripotens* (*Inst.* 1.10, pr.). In law, girls reached puberty nominally at the age of twelve and boys at fourteen, but according to Justinian's *Institutes*, puberty had once been established by physical inspection.<sup>42</sup>

Curiously enough, Ulpian seems to have believed that impotence was an impediment to marriage only if it was the result of castration (*Dig.* 23.3.39.1). Justinian added impotence to the grounds for legitimate divorce, however, determining that a woman (or her parents) could repudiate her husband if he had proved to be unable to have sex with her by virtue of a natural deficiency from the beginning of the marriage until two years had elapsed (*CJ* 5.17.10). Although sterility on the part of the woman was never included as one of the formal grounds for divorce, it is likely that sterility was in fact a common enough reason for divorce. A text in the *Digest* includes sterility as one of the reasons for amicable separation (*divortium bona gratia*),<sup>43</sup> and Valerius Maximus tells us that the very first divorce in Rome was for sterility. He adds that while this was regarded as a supportable reason, there were those who considered the divorce to be reprehensible, judging that the desire for offspring should not be set above marital fidelity.<sup>44</sup> This is a most interesting reflection, not only because of its careful balancing of the companionate and procreative virtues of marriage, but also because Augustine will argue along similar lines.

In some texts, the assumption that marriage exists for the

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<sup>41</sup> See especially Jerome, *De perpetua virginitate beatae Mariae* 20–21 (*PL* 23:213–16); and Augustine, *De Gen. ad litt.* IX.7, (*CSEL* 28.1, pp. 275–76), and *De bono coniugali* 9–10 (*CSEL* 41, pp. 199–202). On Tertullian, see P. Mattei's remarks and references in Tertullian, *Le mariage unique* (*SC* 343, 1988), pp. 44–47.

<sup>42</sup> *Inst.* 1.22, pr. See Corbett, pp. 51–52. Cf. Watson, *The Law of Persons in the Later Roman Republic* (1967), pp. 39–40, and *XII Tables*, p. 25.

<sup>43</sup> *Dig.* 24.1.60–62. See also S. Treggiari, *Roman Marriage* (1991), p. 462, on sterility as a justification for divorce.

<sup>44</sup> Val. Max. II.1.4.

sake of begetting children is explicit. For example, Justinian explains that marriage confers “artificial immortality” upon human kind and renders human nature eternal insofar as this is possible. For this reason, marriage is sacred and a fitting object of concern for the emperor.<sup>45</sup>

It seems to have been usual to include variants of the phrase *liberorum procreandorum causa* (“for the sake of generating offspring”) when drawing up the *tabulae nuptiales*, a document in which a marriage was registered and agreement regarding dotal and other financial terms was recorded.<sup>46</sup> A rescript by the emperor Probus (AD 276–82) to a man called Fortunatus informed him that although no *tabulae nuptiales* had been drawn up for his marriage, these were not essential to establish that he was in fact married. The intention to beget children, however, appears in this document as what makes their association a marriage:

If you have had a wife in your home for the sake of begetting children [*liberorum procreandorum causa*], and your neighbours or others knew this, and a daughter from the marriage has been acknowledged [*suscepta*], then, although neither a nuptial document nor a document pertaining to the birth of your daughter have been drawn up, your marriage and your daughter are legitimate nonetheless. (*CJ* 5.4.9)<sup>47</sup>

The dictum is parallel to affirmations that *tabulae nuptiales* are not essential for a marriage, which will exist provided there is marital affection (e.g. *Dig.* 39.5.31, pr.). The phrase *liberorum procreandorum causa* in this context may be little more than legal jargon, but its use suggests that Romans considered the intention to raise children to be something that distinguished marriage from more casual forms of sexual alliance. A man would sow his wild oats before settling down to raise a family and generate heirs. A concubine could bear children, of course, but they would not be her consort’s own children, nor his agnates. The phrase *liberorum procreandorum causa*, therefore, pertains not to mere biological procreation but to begetting children within one’s own *familia*, and the words *liberi*, *proles* and *filii* normally denote legitimate children or descendants.

<sup>45</sup> *Nov.* 22, pr. Cf. Plato, *Symposium* 206e–207d.

<sup>46</sup> See Gardner, p. 50. See Augustine, *Contra Faustum* XV.7, *CSEL* 25.1, pp. 429–30; *Sermo* 51.13(22), *PL* 38:345; *Contra Iulianum* V.12, *PL* 44:810.

<sup>47</sup> My translation of the last clause is merely a paraphrase. The Latin is: “non ideo minus veritas matrimonii aut susceptae filiae suam habet potestatem.”

The children of incestuous marriages were *fili* in the broad sense but were not *fili* in the narrow or proper sense.<sup>48</sup> A father was said "to take up" (*tollere*) his child after the birth; that is, to recognize it as legitimate. This expression is thought to have derived from the custom whereby the newborn child would be placed on the ground and the father would lift it up as a sign that he recognized it as his own.<sup>49</sup>

Marriage was above all the source of legitimate heirs. In one of Juvenal's *Satires*, Naevolus, the homosexual "husband" of Virro, says that the latter has no reason to complain since he has provided him with heirs. Naevolus has accomplished with Virro's wife that of which Virro himself had proved incapable. Moreover, he has saved Virro's marriage, for the frustrated wife was often ready to tear up the *tabulae nuptiales* and walk out, and would have done so if Naevolus had not been able to satisfy her. Naevolus has already provided him with two heirs, so that Virro can not only demonstrate his manhood but also come into his inheritance, and he will be happy to put the number up to three (so that Virro can benefit from the *ius trium liberorum*).<sup>50</sup>

The origin of Christianity happened to coincide with a trend toward stricter sexual ethics and a greater sense of propriety in some quarters of Greek and Roman society. While this trend originated in Graeco-Roman philosophy, it influenced some among the governing elite. The Stoic doctrine that sexual intercourse took place according to nature only if it was performed for the sake of generating children was one element in this new morality. Sexual intercourse for the sake of pleasure alone or during pregnancy or the menstrual period was abhorrent from this point of view. The Fathers, like Philo before them, endorsed this doctrine and made it their own.<sup>51</sup>

### *Preconditions*

Another way to approach the question "what is marriage?" is

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<sup>48</sup> Thus *Cod. Theod.* 3.12.4, regarding the illegitimacy of marriage between a man and his sister-in-law: "et *fili*, qui exinde fuerint procreati, et successione excludanter nec inter *filios* habebuntur."

<sup>49</sup> See *Oxford Latin Dictionary*, "Tollo," 2. Cf. Juvenal, *Satire* 6.38: "tollere . . . heredem."

<sup>50</sup> *Satire* 9.70–79.

<sup>51</sup> See Peter Brown, *The Body and Society* (1988), pp. 20–24. For an example of Philo's appropriation of the Stoic doctrine, see *De specialibus legibus* III.32–36 (Loeb edition, vol. 7, pp. 494–96).

to consider what a philosopher might call its necessary and sufficient conditions. In regard to marriage in Roman law, therefore, one should inquire as to the conditions of a valid marriage, for the laws provide criteria by which one may judge whether a man and a woman are validly married or not. If certain conditions have not been fulfilled, they are not validly married. If certain conditions are fulfilled, then they are married. Insofar as we have found out what these conditions were, we know what marriage in Roman law was. But we need to qualify this in two ways.

First, neither legislators (who make the laws) nor jurists (who interpret and explain them) have the same objectives as philosophers and natural scientists. Laws can create conditions of validity, and thus add to what is perceived to be the law of nature or contradict or change widely accepted social norms. Moreover, legislators and jurists have pragmatic aims. In the case of Roman law, such persons were not concerned to ascertain precisely what marriage was, and their judgments were not predicated on any precise theory or definition of marriage. They made certain assumptions (which often remained implicit) and established criteria that were intended to be serviceable in practice.

Second, the conditions for valid marriage are of two kinds. On the one hand, there are preconditions: that is, conditions that must be satisfied before the persons in question are deemed even to be qualified to marry. On the other hand, there are the things that are considered to make or to constitute marriage. This distinction may be illustrated by examples familiar in modern western society. We maintain that a man cannot marry his sister. Among the preconditions, therefore, is the absence of any impediment of relationship. We also maintain that a man and a woman cannot be married unless a certain mutual and voluntary agreement has taken place. This agreement, in our view, is not a precondition but rather is what makes them married. In this section we shall consider only the preconditions for marriage under Roman law. We shall later consider what Romans thought made persons married.

As we have noted, to be qualified to marry the partners had to have reached the age of puberty (*Inst.* 1.10.pr.; *CJ* 5.4.24).<sup>52</sup>

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<sup>52</sup> See J. Gaudemet, "Le mariage en droit romain," *Sociétés et mariage*, pp. 53–55.

Civil law also determined that a number of other preconditions should be satisfied, pertaining to citizenship, social status and relationship. Such conditions constituted *conubium*, the legal capacity to marry.<sup>53</sup>

Slaves could not form valid marriages either between themselves or with free persons. In law, the quasi-marital alliance between two slaves was mere cohabitation (*contubernium*). The customary relationship between a free man and a bondswoman was technically also *contubernium*, according to the jurists, although this form of alliance was also called concubinage (*concubinatus*).<sup>54</sup> *Contubernium* was in principle a monogamous and fairly stable relationship, but one without legal consequence. The offspring were not legitimate and they took the status of their mother. If she were servile, so were they.

Varying restrictions regarding marriage between free persons of differing social status were in force at different periods. Following legislation by Augustus (*lex Iulia et Papia*), senators and their male and female descendants for three generations in the male line could not marry freedmen or freedwomen, nor could they marry actors or the sons or daughters of actors (*Dig.* 23.2.44.pr.). The position regarding marriage between the freeborn and the freed before this, in the late Republic, is uncertain. The ruling regarding senators and their children may have been issued to limit a general prohibition against marriage between freed and freeborn citizens (cf. *Dig.* 23.2.23). The sanction against unequal marriage was probably simply that the marriage itself was invalid.<sup>55</sup>

Roman citizens could not validly marry foreigners, unless the foreigners in question had been granted *conubium*. The scope of this impediment was radically altered in AD 212, however, when Caracalla granted citizenship to all free persons in the Roman Empire.

Impediments of relationship existed by virtue of blood relationship (*cognatio*) or because of relationships acquired through

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<sup>53</sup> See Corbett, pp. 24–53; Watson, *XII Tables*, pp. 20–24; Watson, *Persons*, pp. 32–39; and Gardner, pp. 31–38.

<sup>54</sup> *Pauli sent.* II.19.6: "Inter servos et liberos matrimonium contrahi non potest, contubernium potest." On the denial of *conubium* to slaves, see S. Treggiari, *Roman Marriage* (1991), pp. 52–54. On the use of the words *concubinatus* and *concubina* in reference to relationships between freemen and their bondswomen, see J. Gaudemet, "La décision de Callixte en matière de mariage," *Sociétés et mariage* (1980), p. 111.

<sup>55</sup> Cf. *Dig.* 24.1.3.1, 23.2.16.pr. and 23.2.42.1. See J. Gaudemet, "Le mariage en droit romain," *Sociétés et mariage*, pp. 66–73.



adoption or through marriage (*affinitas*). These restrictions are conveniently explained in Justinian's *Institutes* (1.10).<sup>56</sup> A ruling by Justinian in AD 530 prohibits marriage between a man and a girl whom he has received from baptism; that is, between God-father and God-daughter (*CJ* 5.4.26). The ruling is made as a particular application of the principle that a man should not marry someone *in loco filiae* to him. Justinian explains that nothing is so inducive of paternal *affection* as the bond between a man and a girl whom he has received from baptism, for with this bond their two souls are joined by God. This seems to be the first surviving reference to what will be known in the high Middle Ages as the impediment of spiritual cognation.<sup>57</sup>

It is important to distinguish between two kinds of impediments: those which merely entailed that an alliance was not a valid marriage, and those which entailed that the alliance was forbidden. The law condemned an incestuous alliance, for example, as wicked (*Inst.* 1.10.1), but no blame attached to an alliance that fell short of true marriage because of an impediment of citizenship. Nor was a man to be blamed for having a servile concubine. Such relationships were perfectly respectable but were regarded as concubinage, a monogamous and fairly stable relationship that the Romans considered respectable and churchmen usually had to tolerate as a fact of life.

Where *conubium* did exist between a man and a woman who lived together, the only thing that was strictly necessary to make them man and wife was an appropriate attitude or intention. Even if they had never got married in any formal way, they were considered in law to be married if they regarded each other with a mutual regard known as marital affection (*maritalis affectio*). According to Jane Gardner, there is marital affection insofar as a couple "regard each other as man and wife and behave accordingly."<sup>58</sup> One cannot make the definition more precise without begging further questions, for marital affection was never defined in Roman law, and the scope of the

<sup>56</sup> See also *Cod. Theod.* 3.12.2 and 3.12.4; *Dig.* 23.2.17; *CJ* 5.4.26.

<sup>57</sup> On spiritual kinship, see J. H. Lynch, *Godparents and Kinship in Early Medieval Europe* (1986). See also J. Goody, *The Development of the Family and Marriage in Europe* (1983), pp. 194–204.

<sup>58</sup> Gardner, p. 47. On marital affection in Roman law, see S. Treggiari, *Roman Law* (1991), pp. 54–57. J. T. Noonan discusses marital affection in some Roman laws as well as the use of the notion in medieval canon law in his article "Marital affection in the canonists," *Studia Gratiana* 12 (1967), 479–509.

term *affectio* (or *affectus*) ranges from "relationship" through "attitude" and "intention" to "love."

### *Consensus*

What *made* marriage, according to the Roman jurists, was agreement (*consensus*).<sup>59</sup> But whose agreement was required? The jurist Paul (fl. ca. AD 210) explains that the agreement (*consensus*) of the spouses themselves and of those in whose power they are is necessary for marriage.<sup>60</sup> Thus the husband's agreement alone sufficed if he were *sui iuris*, but if he were a *filius familias*, the law required both his agreement and that of his *pater*. We might still ask, in regard to any given period, whether positive agreement or mere non-opposition was required from the *pater* or from the son.

A woman who was *sui iuris* might need the consent of her tutor. It is possible that in the early Republic the agreement of a *filia familias* was not necessary at all. When it came to choosing a spouse, *patria potestas* probably weighed more heavily upon women than upon men.

What was necessary in law was probably less than what was socially acceptable. Thus the family and piers of a *filius familias* might expect him to go along with the wishes of his *pater* out of filial piety, so that his own consent was a mere formality; and a daughter *sui iuris* through the death of her father might be expected to conform with the wishes of her mother or relatives or to comply with a previously arranged marriage. There was a shift of importance during the Empire from the rights of parents and guardians to the rights of the spouses themselves. As the principle of *patria potestas* faded, the rationale for parental interference shifted from patriarchal rights to the need for protection against an ill-considered match. The consent of a mother or other relative might be required, while a father's consent might be considered necessary for the marriage of even an emancipated daughter. In due course, marriages without parental consent came to be regarded as valid, albeit improper.<sup>61</sup>

<sup>59</sup> *Dig.* 35.1.15: "nuptias enim . . . consensus facit."

<sup>60</sup> *Dig.* 23.2.2: "Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt." See S. M. Treggiari, "Consent to Roman Marriage: some aspects of law and reality," *Classical Views* n.s. 26 (1982), 34–44.

<sup>61</sup> See Gaudemet, "Droit romain et principes canoniques," *Sociétés et mariage*, pp. 127–28; and P. Merêa, "Le mariage *sine consensu parentum*," *Revue internationale de droits de l'antiquité* 5 (1950), = *Mélanges Fernand De Visscher* IV, 203–17.

Persons who were *in potestate* needed parental consent to marry (*Inst.* 1.10.pr.), but what right had a son or a daughter to go against a *pater*'s wishes? Here again the position was complicated. The *lex Iulia* ruled that any *pater* who wrongfully prevented the marriage of someone in his power could be made to arrange the marriage (*Dig.* 23.2.19). This rule implies that he would have the right to prevent the marriage when there was good cause. A law in Justinian's *Codex* determined that no-one should be forced to marry, to separate or to be reconciled after a separation (*CJ* 5.4.14; see also *CJ* 5.4.12). *Digest* 23.1.13 (from Paul) says that a *pater* cannot betroth his *filius familias* against the latter's wishes. According to *Digest* 23.2.21, a *filius familias* cannot be forced to marry, but the next clause radically qualifies this ruling and takes us into the realms of legal fiction:

If a man is forced by his *pater* to take a wife whom he would not have taken of his own free will, he has nevertheless contracted marriage, which cannot be contracted against the wishes of the parties; he is considered to have chosen this. (*Dig.* 23.2.22)

It seems, therefore, that while a son would have some right of legal redress if his *pater* opposed his own choice of spouse (*Dig.* 23.2.19), he had virtually no right to oppose his *pater* if the latter forced him into a marriage.

Something of the position of a daughter-in-power can be gleaned from the rulings on betrothal in *Digest* 23.1. According to 23.1.11, betrothal requires the same agreement of the contracting parties as marriage, and therefore, again as in marriage, the agreement of a *filia familias* is required for her betrothal. The following clause (23.1.12), however, from Ulpian, adds that she will be considered to have given her consent if she does not oppose the will of her *pater*, and that she has the right of dissent only if the man in question is morally disreputable.

*Digest* 23.2.28 says that the patron of a freedwoman may not marry her against her will, but the next clause (23.2.29) adds that this prohibition does not apply if her patron has manumitted her in order to marry her. And if, having been manumitted and married to her patron, she becomes divorced from him, then she cannot marry another man without her patron's agreement (*Dig.* 23.2.45 and 51; *CJ* 5.5.1).

It is clear, therefore, that marriage in Roman law depended on the agreement of the partners alone only if they were *sui*

*iuris*. (I leave aside here the question of the rights of tutors.) The marriage of a person who was *in potestate* required in addition the agreement of the *pater*, and it appears from *Digest* 23.2.22 that a father could effectively force his *filius familias* into a marriage. The onus of agreement seems to fall on the partners themselves, however, when we consider two other aspects of the law of marriage: divorce and marital affection. In the law of the Empire, a *pater* could neither force his happily married child to divorce nor prevent his child from doing so. And marital affection belonged to the partners themselves, although in the case of partners who were *alieni iuris*, their affection would have sufficed for marriage only on condition that they had married with the consent of their *paters* or families.<sup>62</sup> From this point of view, parental consent was a kind of precondition.

Agreement was false if it was merely simulated. Hence "a simulated marriage is of no effect" (*Dig.* 23.2.30). Insanity likewise vitiates agreement, and therefore a mad person cannot get married. Nevertheless, if insanity arises after the marriage has been validly contracted, this does not dissolve the marriage. "Insanity," we are told, "prevents marriage from being contracted, because there must be agreement, but it does not impede a marriage that has been validly contracted" (*Dig.* 23.2.16.2).<sup>63</sup> This ruling has been interpreted as evidence that marriage was a quasi-contractual affair which required *consensus* for its inception but not for its continued existence,<sup>64</sup> but the rationale was probably entirely utilitarian.<sup>65</sup> It would be harsh indeed if a spouse who lost his sanity found himself *ipso facto* no longer married.

Since divorce under Roman law required voluntary dissent, just as marriage required voluntary agreement, an insane man could not repudiate his wife nor an insane woman her husband, although her *pater* could do so on her behalf (*Dig.* 24.3.22.7; 24.2.4). The agreement of an insane *pater* to the marriage of a son or daughter would likewise be null, but in

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<sup>62</sup> Cf. *Cod. Theod.* 3.7.3: there is a valid marriage when there is "inter pares honestate personas nulla lege inpediente consortium, quod ipsorum consensu atque amicorum fide firmatur."

<sup>63</sup> See also *Pauli sent.* II.19.7 and *Dig.* 1.6.8. Some of the legal consequences of marriage might apply when a *pater* married off an insane daughter, although the marriage would not be strictly valid: see *Dig.* 36.1.79.1.

<sup>64</sup> See J. Huber, *Der Ehekonsens im römischen Recht* (1977).

<sup>65</sup> Cf. *Dig.* 24.3.22.7.

that case the child could obtain the necessary consent from a magistrate (*CJ* 5.4.25; *Inst.* 1.10.pr.). Ulpian says that a father's agreement to his child's marriage is absolutely necessary if the grandfather is insane, and that the grandfather's agreement suffices if the father is insane (*Dig.* 23.2.9).<sup>66</sup>

The principle involved in these rulings is that an insane person does not know his or her own mind and therefore cannot provide the *consensus* that makes marriage. For the same reason, the insane could not form valid contractual arrangements of any kind (*Dig.* 46.1.70.4; 44.7.1.12; 50.17.5). A mad person was considered to have no *voluntas*: (*Dig.* 50.17.40: "Furiosi . . . nulla voluntas est"), so that his or her expressed wish had no legal force. Similarly, the madman and the *pupillus* were considered to have no settled intention (no *affectio* or *affectus*).<sup>67</sup>

#### *The sufficiency of marital accord*

Roman legislators and jurists, as we have seen, considered marriage to be founded on the accord of the parties. Inasmuch as marriage was in their view a condition that the spouses had contracted, the consent or agreement of the partners created the marriage. The presence of marital affection, however, sufficed to prove (other things being equal) that a man and a woman who were cohabiting were married. Clearly, the mutual accord of the parties was necessary for the existence of marriage. But was this accord, together with any other necessary consents, really sufficient to establish that a man and a woman between whom there was *conubium* were married? There are a number of texts which state that while accord (in the form of either *consensus* or *affectio*) is necessary, something else that might be considered integral to getting or being married is not in fact necessary in law. Legislators and jurists eliminate ceremonies, dotation and documentation in this way. Free marriage was an essentially informal affair, and in this respect all that counted,

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<sup>66</sup> In the situation envisaged, the grandfather is the son's *paterfamilias*. The ruling implies that as long as the grandfather survived, and if both grandfather and father were sane, the agreement of both was required. According to *Dig.* 23.2.16.1, the agreement of grandfather and father are required for the marriage of a son, but the agreement of the grandfather suffices for the marriage of a daughter.

<sup>67</sup> *Dig.* 41.2.1.3, 43.4.1.6. These rulings are from Ulpian. Noonan, in "Marital Affection," *Studia Gratiana* 12, pp. 487–88, argues that *affectio* took on an "emotional tone" in the later legislation of the *Codex*, denoting fondness etc.

apart from some exceptions that will be discussed below, was the agreement or accord of the parties. Other sources state that coitus and cohabitation are not necessary conditions.

The Roman dowry (*dos*) consisted in wealth that was brought into the marriage with the woman.<sup>68</sup> It was normally bestowed by the bride's father, but it might also come from other members of her family, or from an outsider, or even from the bride herself. The dowry might consist either in actual wealth or in the promise of wealth: in other words, in anything that increased the estate of the husband. Whatever he acquired as a dowry became his property and was originally intended as a contribution to the cost of the new marriage. Since a wife or her family could recover all or part of the dowry if the partners separated or if the husband died, however, the dowry afforded the wife some financial security and provided her family with a way of providing it.

In legislation of the later Empire, we find the husband providing a counter-dowry to his wife. This would support her and her children if the marriage ended.<sup>69</sup> At first the husband always bestowed this gift before the marriage and it was sometimes associated with the betrothal. It was therefore known as *donatio ante nuptias*. Justinian ruled that a husband might endow his wife in this way after they had become married, however, and thereby created a major exception to the law against gifts between man and wife. The counter-dowry was thenceforth sometimes known as *donatio propter nuptias*. The custom of the counter-dowry was Hellenic, and it not clear how widespread it became among Latin citizens. Nevertheless, two novels by Western emperors, Valentinian in 452 and Majorian in 458, affirm the need for a balance between the dowry and the betrothal gifts (*sponsalicia largitas*). The former declares that the two gifts should be of equal size and the latter that the dowry should not be less than the betrothal gift.<sup>70</sup>

From the first century AD, it was customary to draw up a document that would be signed and witnessed, usually but not necessarily on the wedding-day.<sup>71</sup> As well as conventional state-

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<sup>68</sup> See Corbett, pp. 147–204; Gardner, pp. 97–116; Thomas, *Text-book* pp. 428–31; and Watson, *Persons*, pp. 57–76.

<sup>69</sup> See Corbett, pp. 205–10.

<sup>70</sup> Val. Nov. 35.9; Maj. Nov. 6.9.

<sup>71</sup> See C. Castello, "Lo strumento dotale come prova del matrimonio," *Studia et documenta historiae et iuris* 4 (1938), 208–44; and H. J. Wolff, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law* (1939).

ments about marriage and its purpose, the document contained agreements pertaining to the dowry and counter-dowry. The existence of the document might provide evidence that the man and woman were really married, and not merely cohabiting, but while the Greeks traditionally considered nuptial gifts to be necessary for the validity of marriage, Roman law did not.<sup>72</sup> Nor was dotal documentation necessary, although it is evident that the dotal document was popularly regarded as a kind of marriage contract. The rescript of Probus to Fortunatus, noted above (*CJ* 5.4.9), implies both that people often thought that the nuptial document was necessary and that this was not in fact true in law. A constitution by Diocletian explicitly says that a dotal instrument is not necessary for proof of the existence of a marriage (*CJ* 5.4.13). Reading between the lines, we can see that by the late third century dotal documentation had become popularly regarded as necessary for the validity of marriage and that legislators and jurists resisted this idea. It should be noted that it was above all documentation, rather than the dowry itself, that was in question. The law did not strictly require documentation, although it must often have been the easiest way of establishing the existence of a marriage.

A constitution by Theodosius and Valentinian in AD 428 affirms that where there has been neither dotal documentation ("donationum ante nuptias vel dotis instrumenta") nor ceremonies ("pompa etiam aliaque nuptiarum celebritas"), the marriage is nevertheless sound and its issue legitimate provided that the following conditions are satisfied: first, that the marriage is between persons of comparable social status ("inter pares honestate personas"); second, that there is no legal impediment; and third, that the alliance existed with the consent of the partners themselves and of their relatives (*amici*).<sup>73</sup> The text may perhaps imply that formal endowment was necessary for the validity of a marriage between persons of unequal status. It seems that some did construe the ruling in this way, for in the *Codex* it is followed by a constitution of AD 520–23 in which Justinian notes that some old laws have ruled, albeit obscurely ("licet obscurius"), that marriage between persons of unequal status ("impares honestate") was valid only if there was dotal documentation. Justinian firmly rejects this doctrine.<sup>74</sup>

<sup>72</sup> See Wolff, *ibid.*, pp. 152 and 207–09.

<sup>73</sup> *Cod. Theod.* 3.7.3, = *CJ* 5.4.22.

<sup>74</sup> *CJ* 5.4.23.7.

In AD 458, however, the emperor Majorian ruled that if a man and a woman were united without a dowry (*sine dote*), their union would incur *infamia* and would not be regarded as marriage. The issue of the union would be illegitimate.<sup>75</sup> But in a novel of AD 463, Leo and Severus abrogated certain unjust laws by Majorian, including, it seems, the law making the validity of marriage conditional upon dotation. Only those parts of Majorian's novel of 458 that were in accordance with the ancient laws were to stand (Severus, *Novel* 1).

In AD 533, Justinian ruled that for the validity of a marriage, it did not matter whether there had been a dowry or dotal documents (*dotalia instrumenta*). A marriage is valid if it has been contracted with the consent of the woman's parents, or with her own agreement if she had no parents, provided that she was received with marital affection, "for marriages are contracted not by dowries but by affection" (*CJ* 5.17.11).

A text by Gaius on hypothecs likens marriage to "obligations that are contracted by agreement [*consensus*]" as an example of a transaction that does not require documentation. In a transaction of this kind, documentation facilitates proof but is not essential, for the transaction is recognized as valid if one can prove by any means that it took place (*Dig.* 20.1.4).

Where *conubium* existed between a man and a woman who were cohabiting but had never formally contracted to become married, their relationship was marriage in the eyes of the law if and only if there was marital affection.<sup>76</sup> The jurists insist that it is marital affection that is decisive, and not dotation. A text from Papinian (*Dig.* 39.5.31, pr.) notes that gifts from a man to his concubine do not become invalid if they later marry, but adds that one should consider whether there was marital honour and affection before they became formally married, for "it is not documents [*tabulae*] that make marriage." The existence of marital affection even before the marriage was formally recognized, therefore, would have invalidated the gifts. Justinian ruled in AD 529 that when a man has been married to a woman without documentation and has had children by her, and then out of the same affection (*ex eadem adfectione*) has formalized the marriage by documentation (*nuptialia instrumenta*) and has had more children by her,

<sup>75</sup> Majorian, *Novel* 6.9.

<sup>76</sup> A puzzling text from Modestinus states that cohabitation with a freewoman is presumed to be marriage unless she is a prostitute (*Dig.* 23.2.24).



the latter children should have no advantage over the former in respect of legitimacy (*CJ* 5.27.10, pr.). The implied argument is that it is affection alone, and not documentation, that creates legitimate matrimony. The case envisaged, he explains, is to be distinguished from that of a man who has had children by a woman towards whom he did not have that affection which would make her worthy to be called “wife,” and who later formalized the marriage by documentation when affection came (*CJ* 5.27.10.1 and 5.27.11). There was clearly scope for subtle inquiries and fine points of law in such cases.

Justinian’s *Novel* 117, from AD 542, applies a similar rationale to cases involving divorce and remarriage. Suppose that a man is married by affection alone and without dotal documentation, and that he has children from the union. He dissolves this marriage and marries again, this time with dotal documentation, and has more children. The children of the second alliance, Justinian rules, should have no advantage over those of the first with regard to inheritance. For a marriage can be constituted by affection alone. The same principle would apply in the opposite case: that is, if the first marriage were documented and the second were not (*Nov.* 117.3).

In a novel of AD 538, Justinian notes that according to both the legislation of his predecessors and his own constitutions, marriages that existed by virtue of affection alone and without dotal documentation were valid. But he goes on to explain that this has given rise, human nature being what it is, to countless false allegations and deceitful acts. In future, licence to marry in this way will belong only to the lowliest citizens: that is, to uneducated farmers and common soldiers, and to those leading an abject life, with little or no wealth (74.4.3). The *illustres* and higher dignitaries must observe formalities such as the dowry and the *donatio ante nuptias* and everything else that befits their rank (74.4.1). For the rest, three courses of action are open. (I presume that they are set out in order of preference.) A couple may observe the practice of nuptial gifts and documentation. If they do not wish to do this, they should present themselves to the advocate of a church who, having summoned at least three clerics as witnesses, should record their marriage. Failing this, a record of the marriage should at least be retained in the archives of a church (74.4.1–2). Unless they have properly documented their marriage in one way or another, the man and woman will not be considered to have been joined in nuptial affection (74.4.2). Here Justinian

retains the theoretical principle that affection makes marriage, but he rules that in practice documentation is required, except in the case of the humblest citizens, for the affection to be recognized in law. In other words, the law requires documentation as evidence of affection.

In *Novel* 117, from AD 542, Justinian modified and relaxed these rules, providing more scope for marriage by affection alone. The new ruling was a considerable climb-down from the position of AD 538. Having outlined his previous ruling, he introduces two exceptions regarding the *illustres* and higher dignitaries. First, the requirement does not apply to those who were already married before they were dignified, and in such cases the children are legitimate even without dotal documentation. Second, barbarian citizens who have been so dignified are exempt. Apart from these exceptions, the new requirements remain in force for those of high status, but for all others of lesser status, Justinian now rules that while they may marry with dotal documentation if they wish, they are free nonetheless to marry by affection alone (*Nov.* 117.4).

We have noted that ceremonies (“pompa . . . aliaque nuptiarum celebritas”) were not essential, at least for persons *pares honestate*, according to a constitution that Theodosius issued in AD 428. In a constitution of 426, he had ruled that common soldiers and bodyguards were permitted to marry freeborn women without solemnity (*sine aliqua sollemnitate*: *CJ* 5.4.21). Perhaps Justinian included solemnities when he ruled that those of the highest rank should be married with nuptial gifts and everything else that befits their dignity (*Nov.* 74.4.1). Nuptial ceremonies were common, and their central event was the *in domum deductio*: that is, the leading of the bride into her husband’s house. Typically, a banquet at the house of the bride’s father would be followed by a torchlit procession to her husband’s house, with the bride wearing a red veil (the *flammeum*). Ribald songs and the throwing of nuts might invoke fertility. The Roman ceremonies passed, *mutatis mutandis*, into Christian custom.<sup>77</sup> It is striking that the question of whether ceremonies are necessary for the legitimacy of a marriage rarely even arises in the corpus of Justinian.

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<sup>77</sup> See L. Anné, “La conclusion du mariage,” *Ephemerides Theologicae Lovanienses* 12 (1935), pp. 531–37; and S. Treggiari, *Roman Marriage* (1991), pp. 161–70. For a list of the typical elements, with sources, see S. Treggiari’s article “Roman Marriage,” in *Civilization of the Ancient Mediterranean* (1988), vol. 3, pp. 1349–50.

One sometimes had to determine when a marriage had begun. According to a dictum from Ulpian in the *Digest*, a marriage begins as soon as the woman is received as a wife (*ducta*), even if she has not yet come into her husband's bedchamber, for marriage is created by agreement and not by sexual intercourse: "videtur impleta condicio statim atque ducta est uxor, quamvis nondum in cubiculum mariti venerit. Nuptias enim non concubitus, sed consensus facit."<sup>78</sup>

A constitution by the emperor Zeno in AD 475 concerns the practice whereby a man would marry his brother's widow if the previous marriage had not been consummated, presuming that marriage is not really contracted until the couple have come together carnally ("arbitrati scilicet, quod certis legum conditōribus placuit, cum corpore non convenerint, nuptias re non videri contractas"). Zeno categorically rejects the doctrine (*CJ* 5.5.8).

These texts concern the inception of a marriage, and affirm in effect that marriage begins prior to consummation. Another text ascribed to Ulpian says that coitus is not a necessary condition for the presumption that an established marriage continues to exist. If a woman and her husband have lived apart for some time, but have continued to regard each other with marital honour, then gifts between them are invalid as if the marriage endured ("quasi duraverint nuptiae"), "for it is not coitus that makes marriage, but marital affection" (*Dig.* 24.1.32.13).

The maxims noted above, which the *Digest* ascribes to Ulpian, are sometimes echoed in the Fathers. Ambrose says, with reference to the Virgin Mary, that "it is not the defloration of virginity that makes marriage, but the conjugal compact."<sup>79</sup> Similarly Augustine, again with the marriage of Mary and Joseph in mind, argues that marriage is not made by libido but by conjugal charity.<sup>80</sup> The author of the *Opus imperfectum in Mattheum* says that "it is not coitus that makes marriage but intent [*voluntas*]," and deduces from this that mere physical separation does not dissolve marriage.<sup>81</sup> Cyril of Alexandria, commenting on John 4:17–18, says that "it is not the coitus [*synodos*] that comes from pleasure, but the consent (*synainesis*) that is in accordance

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<sup>78</sup> *Dig.* 30.1.15. The dictum "nuptias enim non concubitus sed consensus facit" also appears in *Dig.* 50.17.30, where it is ascribed to Ulpian.

<sup>79</sup> *De institutione virginis* 6.41, *PL* 16:331A.

<sup>80</sup> *Sermo* 51.13(21), *PL* 38:344.

<sup>81</sup> Ps.-Chrysostom, *Opus imperfectum in Mattheum*, 32, *PG* 56:802.

with the law, and the union which comes from chaste love, that make blameless marriage.”<sup>82</sup> Some have even suggested that the parallel dicta ascribed to Ulpian are really Christian interpolations,<sup>83</sup> but this seems far fetched to me. The Christian conception of marriage as a union in one flesh emphasized the place of coitus in marriage, and Jerome was swimming with the tide of patristic opinion when he maintained that Joseph was really Mary’s guardian rather than her husband.<sup>84</sup> Ulpian’s dicta, therefore, look more Roman than Christian.

It would be rash to attribute to Roman law the purist variety of consensualism that was introduced by Augustine and taken up again by certain influential authors in the twelfth century (such as Hugh of St Victor). From this perspective, sexual union and procreation seemed to be something additional and even incidental to marriage, so that Mary and Joseph were in the fullest sense married to one another. The high medieval consensualists not only affirmed that marriage was created by agreement alone but also denied that in agreeing to be married one agrees to have sexual intercourse. This theory was the product of exegetical, theological and ideological concerns of which the classical Roman jurists and legislators knew nothing. As we have noted, marriage was assumed in Roman law to be a relationship that one enters for the sake of begetting children. Coitus was no doubt assumed, in an unformulated way, to be a normal part of marriage. Moreover, consummation in the marriage bed was the normal conclusion of the traditional marriage ceremonies.<sup>85</sup> We can only speculate as to what the jurists would have made of the marriage of Mary and Joseph (as it was traditionally interpreted). Unlike Augustine, they might have had some difficulty accepting that there could be marital affection between a man and a woman when the latter had vowed even before her marriage to remain perpetually a virgin.

Although marriage was considered to be made by agreement, it is arguable that this alone was not sufficient.<sup>86</sup> A difficult text from Scaevola (later 2nd century AD) affirms that a gift

<sup>82</sup> Cyril of Alexandria, *In Ioannis evangelium* II, 4:17–18, PL 73:302.

<sup>83</sup> See E. A. Clark, “‘Adam’s only companion’: Augustine and the early Christian debate on marriage,” in R. R. Edwards and S. Spector (eds), *The Olde Daunce* (1991), p. 30.

<sup>84</sup> *Adversus Helvidium* 19, PL 23:213B.

<sup>85</sup> See S. Treggiari, *Roman Marriage* (1991), pp. 168–69.

<sup>86</sup> See Charles Donahue, “The case of the man who fell into the Tiber,” *American Journal of Legal History* 22 (1978), pp. 6–11.

may be invalid even if it was made before the *deductio* and the signing of dotal documents, for marriage begins when there is agreement.<sup>87</sup> It seems from *Digest* 35.1.15 (noted above), however, that a marriage was normally considered to have begun when the woman was led (*ducta*) to her husband's house. The emperor Aurelian (AD 270–75) explicitly applied this principle to the case of a gift made from a man to a woman on the day of their wedding. The question of whether the gift was valid turned upon that of whether they were already married at the precise time when the gift was made. Aurelian determined that the woman had become married when she entered her husband's home (*CJ* 5.3.6). The evidence suggests, therefore, that the *deductio* was a necessary condition for marriage. This would explain why a woman, unlike a man, could not be married in her absence. In other words, she might be married by proxy to an absent man, but only if she was taken into his house.<sup>88</sup> If her husband died before returning home (for example, by falling into the Tiber on his way back to Rome after a dinner), the woman was nevertheless to be regarded as his wife. She must therefore go into mourning for the prescribed period and would retain or acquire her dowry (*Dig.* 23.2.5–6).<sup>89</sup> It is arguable that *deductio* was not strictly a necessary condition but rather served as presumptive or external proof of marital intention and thus provided a useful rule of thumb when the precise time at which a marriage had begun needed to be determined.<sup>90</sup> But the Roman law of marriage was an applied and not a theoretical science, and one cannot always safely distinguish between criteria for something (the standards used for judging that something is the case) and its implied definition (the conditions that make something the case).

The *deductio* of the woman was probably regarded from the legal point of view as a sufficient but notional indication that the couple had set up home together. Marriage was regarded as a form of cohabitation. When it was necessary to determine

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<sup>87</sup> *Dig.* 24.1.66. The text is discussed but not satisfactorily accounted for by Corbett (pp. 92–93).

<sup>88</sup> Corbett, pp. 91–94. *Pauli sent.* II.19.9: "Vir absens uxorem ducere potest, femina absens nubere non potest."

<sup>89</sup> See C. Donahue, "The case of the man who fell into the Tiber," *American Journal of Legal History* 22 (1978), 1–53, for an account of how the high medieval scholars of Roman law interpreted this text.

<sup>90</sup> This is the line taken by R. Villers, *Rome et le droit privé* (1977), p. 215, and by Gaudemet, "Originalité et destin du mariage romain," *Sociétés et mariage*, pp. 143–44.

whether an informal alliance between a man and a woman amounted to marriage, the existence of marital affection was sufficient, but it is improbable that a man and a woman who had never lived together could have been deemed to regard each other with marital affection. Probus told the man called Fortunatus that he was validly married, even if there were no nuptial documents, provided that "you have had a wife in your home for the sake of begetting children, and your neighbours or others knew this" (*CJ* 5.4.9). The constitution of Theodosius and Valentinian of AD 428, which ruled that dotal documentation and ceremonies were not necessary to establish the legitimacy of a marriage, says that a man and a woman's *consortium* should be regarded as marriage if there is no impediment of status and if the relevant parties have consented (*Cod. Theod.* 3.7.3). As the use of the word *consortium* indicates, the law presupposes that the partners are cohabiting. Ulpian argues that a man and a woman who no longer live together are still married if they regard each other with marital honour, since marriage is made by affection and not by coitus (*Dig.* 24.1.32.13), but he is referring to an already established marriage. He would probably not maintain that there can be marital affection between a man and a woman who have never lived together.

It is arguable, therefore, that *consensus* alone was not sufficient and that *deductio* was required in addition, but it may be more accurate to say that *deductio* was necessary to manifest the required consent. What was required for marriage was not simply an act of agreement, as was the case in high medieval consensualism, but rather a settled intention to be married. That is why it could also be maintained that marriage was made by marital affection. Until a couple set up home together, or there was at least something that could notionally count as setting up home from the minimalist perspective of the law, there was insufficient evidence that the couple regarded each other as man and wife.

I have emphasized that Roman law lacked both the support of extensive theoretical reflection upon the nature of marriage and the presupposition that marriage, once validly formed, was indissoluble. This being the case, one should not suppose that one can deduce necessary and sufficient conditions for marriage from texts that aimed to determine when a marriage had begun or whether it still existed. There was a general presumption that men and women living together as man and wife were married (other things being equal), and that persons

who went through the motions of getting married intended to be married, but neither marital affection nor marriage itself was ever precisely defined. Some undefined cultural givens are built in to the notion of marriage in Roman law. One cannot deduce a definition or a concept of marriage from rules determining whether a genuine marriage still exists or precisely when a genuine marriage began to exist.

*Continuous and existential accord*

The ease with which divorce was possible under classical Roman law suggests that the dissent of either partner was sufficient to dissolve a marriage. Marriage was founded not so much on an initial, quasi-contractual agreement as on a continuous accord. This accord might be considered to obtain even after the spouses had lost the positive will to remain married, but if either partner actually dissented from the marriage, then, since it takes two to make an accord, the marriage no longer existed. When Ulpian argues that spouses who have ceased to live together are still married *as long as they regard each other with marital affection*, he implies that they would no longer be married if they ceased to regard each other in this way. From this point of view, it seems that the accord which makes marriage is not so much an initial, quasi-contractual agreement as a continuing condition. In other words, the endurance of the marriage is a *de facto*, rather than a *de iure*, matter.

These peculiarities have given rise in the scholarly literature to two closely related ways of characterizing Roman marriage.<sup>91</sup> First, Roman marriage is said to have been a *verwirklichte Lebensgemeinschaft* or "social fact." According to ecclesiastical and modern legal conceptions of marriage, getting married is to take on a set of obligations that are defined and enforced by law. Roman law, on the contrary, seems merely to determine the juridical consequences of marriage, and these pertain mainly to the offspring. As long as the partners regard each other as man and wife, and sufficient evidence of this fact can be obtained by the witness of relatives or neighbours, they are considered to be married. Marriage is simply a fact of life. (It should be noted, however, that *conubium* was a right, and that the law determined who had this right.) Marriage in

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<sup>91</sup> See H. J. Wolff, "Doctrinal trends in postclassical Roman marriage law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 67 (1950), pp. 263–65.

itself, therefore, is a matter of fact (*res facti*) rather than a matter of right (*res iuris*). It is congruent with this that marriage was not automatically restored by *postliminium* (that is, the right whereby someone who returned from captivity would resume his former rank and privileges and his property in land and slaves), although there is no evidence that the Roman jurists themselves explained in this way the fact that *postliminium* did not apply (or at least did not apply automatically).<sup>92</sup> Characterizing Roman marriage as a social fact has its limitations but it is relatively unproblematic. It is safe to say (vaguely) that Roman law tended to treat marriage as if it was a social fact.

Second, Roman marriage has been characterized by reference to the nature of marital agreement itself. The argument goes that whereas *consensus* in the Christian conception of marriage is an initial act of agreement that creates a continuing and binding obligation, *consensus* in the Roman marriage of classical law was a continuing condition, so that a marriage would last as long as there was *consensus* and would cease when *consensus* ceased. German scholars have named the two forms of agreement *Initialkonsens* and *Kontinuativkonsens* respectively. The idea was introduced by Manenti in 1889 and has been very influential.<sup>93</sup> The theory is attractive not only because it explains why divorce was easily available, but also because it explains why marriage could be dissolved by unilateral dissent. From this point of view it would seem that there was a partial shift of emphasis from continuous to initial accord under the Christian emperors.

The latter theory cannot be sustained on merely semantic grounds, for there is no evidence that the word *consensus* ever denoted continuous accord. Although Roman law never treated marriage strictly as a legal contract, the spouses were said to contract marriage (*contrahere matrimonium*), and marriage was likened to business contracts in certain respects.<sup>94</sup> Moreover, the notion of marital affection may have arisen not so much as an account of the nature of marriage but as a way of distinguishing marriage from other forms of sexual alliance, such as concubinage.

<sup>92</sup> See Corbett, pp. 214–15.

<sup>93</sup> *Dell'inapponibilità di condizioni al negozi giuridici e in specie delle condizioni apposte al matrimonio* (Siena).

<sup>94</sup> The use of the *arrha* in betrothals is a case in point. See also *Dig.* 20.1.4, on hypothecs, in which marriage is counted as an example of "obligations which are contracted by *consensus*."



A study by Josef Huber aimed to disprove Manenti's thesis by a careful analysis of divorce, nullity and impediments.<sup>95</sup> For example, an insane person could not contract marriage, but a marriage was not *ipso facto* dissolved if one of the spouses became mad after the marriage had been established (*Dig.* 23.2.16.2; 1.6.8). The point was that insanity vitiated *consensus*; but if supervenient insanity did not dissolve marriage, then, Huber argues, the requisite marital agreement must have been initial and not continuous. However, as Gaudemet has noted, neither continuous nor initial *consensus* is posited by the Roman jurists themselves. Moreover, the rationale for ruling that supervenient insanity was not an impediment was chiefly humanitarian.<sup>96</sup> The problem with Huber's analysis is that it presumes that the Roman law of marriage was more consistent and more founded on theory than it really was.

We touch here upon the problem of inducing a rationale from particular laws and judgments. The natural scientist attempts to reduce manifold particularity to a few natural laws. Roman law, however, is a rational product of the human mind. Hence the scholar looks for the rationale implied by the laws. There could hardly be any serious study of Roman law without some use this method, but it can be taken too far, especially when the scholar seems to know more about this rationale than the legislators themselves did. Even the jurists reasoned inductively from laws to reasons. The Roman law of marriage was not a pure science, and it was the result of historical trends and practical considerations.

The theory of continuous agreement is a product of hindsight. The point is that the Roman conception of marital accord differed markedly from that which prevailed in the Western Church, in which marriage was regarded as a binding compact. Thus a new vocabulary appears in patristic sources, where the marriage bond is denoted by words such as *pactio*, *pactum*, *foedus*, *confoederatio* and *societas*.<sup>97</sup> The Christian conception of an initial, quasi-contractual accord was perfectly formulated in the high Middle Ages, when marital agreement was defined as a verbal act that is the efficient cause of matrimony.<sup>98</sup> From this,

<sup>95</sup> *Der Ehekonsens im römischen Recht* (1977). See also E. Volterra, *La conception du mariage d'après les juristes romains* (Padua, 1940), pp. 58 ff.

<sup>96</sup> *Revue d'Histoire de droit* 47 (1979), pp. 171–73.

<sup>97</sup> See J. Gaudemet, *L'Église dans l'Empire romain*, p. 532; Huber, *Der Ehekonsens*, p. 35.

<sup>98</sup> See Peter Lombard, *Sent.* IV.27.3.1 (Grottaferrata, 1981, tome II,

retrospective, point of view, Roman law seems to have identified the accord that makes marriage with a continuing rather than an initial intention.

### *Concubinage*

As we have noted, there were two kinds of monogamous and relatively stable sexual relationship in Roman society: marriage and concubinage. A man who took a concubine instead of a wife would thereby have a companion and sexual consolation, but the offspring of their union would be illegitimate and he would not have the benefit of a dowry. Contrariwise, a man would get married to produce posterity for himself in the form of heirs, and he would try to find a bride who came with a good dowry.

Concubinage cannot be understood in abstraction from certain social conventions and standards of propriety whose outlines are not entirely clear to us and which varied from one era to another. Augustine's *Confessions* provides a vivid glimpse of these conventions. His concubine, whom he never names, was faithful to him and bore him a son whom he loved, but his mother persuaded him to dismiss his concubine so that he should be ready to marry a girl of suitable social standing. Although both were heartbroken—we should say that they were in love with each other—he regards the union as an arrangement made to satisfy sexual desire (*pactum libidinosi amoris*). The chief distinction between this kind of relationship and marriage, in his view, is that unlike marriage it is not made for the sake of procreating children. He explains that when children spring from such a union, this is contrary to one's intention, although they may thereafter force one to love them (as Augustine was forced to love his natural son, Adeodatus).<sup>99</sup>

Concubinage was distinguished from marriage in four respects. First, as we have noted, the children of the union were not legitimate: they were not the man's heirs, and in a sense were not *his* children. Second, the man and woman did not regard themselves as man and wife: in other words, they did not regard each other with marital affection. Third, the woman was normally socially inferior to the man and in some sense his servant. Augustine's concubine was clearly inferior to him in status. Pope Leo I, in a rescript to Rusticus, Bishop of

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p. 422).

<sup>99</sup> *Conf.* IV.2(2), CCL 27, pp. 40–41.

Narbonne, maintained that a certain cleric who had been living with a concubine and had had children by her was not married to her, and therefore was free to marry someone else.<sup>100</sup> Here Leo's usage is such that a *concubina* is presumed to be a bondswoman. Fourth, the relationship could be dissolved without the need for a divorce. This became an important consideration under Constantine and his successors, who introduced criteria and procedures for valid divorce.

Leo says nothing to indicate that he disapproved of the course of action envisaged in the letter to Rusticus, whereby a man would leave his concubine to marry another woman. He does note an alternative: the man might have become legitimately married to the woman whom he had been living with by manumitting her and then formally marrying her with dotation and public nuptials. (Dotation would have involved the preparation and witnessing of a dotal document.) By custom, a man who wished his concubine to be acknowledged as his wife would marry her with all due formality so that her new status was made clear and his new intentions (in other words, his marital affection) was declared. As we have noted, a constitution issued by Theodosius in AD 428 seemed to imply that formal dotation was necessary for the validity of a marriage between partners who were of unequal status. Justinian himself, however, maintained that marital affection alone, if there was *conubium*, was strictly all that was required.<sup>101</sup>

When a man's concubine was his bondswoman, the disparity itself prevented the alliance from being recognized as valid marriage and the children were *ipso facto* illegitimate. When there was *conubium*, all that distinguished the relationship from marriage was the man's intention: that is to say, his lack of marital affection.<sup>102</sup> If they became married, their marriage would overcome the disparity of status.

Although there seems to have been some tendency within the Church to assimilate concubinage to marriage, the Church normally differentiated between the two relationships. Inasmuch as concubinage was less than marriage it was a form of

<sup>100</sup> *Epist.* 167, *inquisitio* 4, *PL* 54:1204B–1205A.

<sup>101</sup> *CJ* 5.4.22 (= *Cod. Theod.* 3.7.3). Cf. *CJ* 5.4.23.7.

<sup>102</sup> Thus Paul in *Dig.* 25.7.4: "Concubinam ex sola animi destinatione aestimari oportet;" and *Paul sent.* II.20.1: "Concubina igitur ab uxore solo dilectu separatur." It is possible that in classical usage even an alliance between persons of equal status, if there was no affection, might be called concubinage.

fornication, but it was tolerated in the Church to a remarkable degree. Concubinage survived in various forms until the high Middle Ages, when it provided a curious and semi-official solution to the problem of clerical celibacy.<sup>103</sup>

*What was marriage?*

It should be clear from what has been said that defining marriage as conceived in Roman law is very difficult. According to the traditional definitions noted by the jurists, marriage is a union in which a man and women share a common life. Such definitions were not without significance, but they were of little or no legal consequence. Moreover, these definitions do not take into account much of what civil law determines about marriage, for example what constituted *conubium*. If we attempt to define marriage in terms stated or implied in the laws and in the opinions of the jurists, we quickly come unstuck. For example, we are likely to want to include the notion of marital affection in our definition, but that will make our definition circular and vacuous. Again, if we try to define marriage as an agreement to a certain relationship, we soon find that it is difficult to define the relationship in abstraction from the agreement. To make matters worse, we cannot assume that the laws and legal opinions were fully supported by a consistent theory. Moreover, we cannot assume that the rationale for these laws and opinions was static. They were the result of trends and of shifts of emphasis.

What we must aim for is something looser than a definition. We can reasonably expect to discover how legislators and jurists conceived marriage and what kind of thing they thought marriage normally or typically was.

A good point of departure is Ulpian's observation (*Dig.* 1.1.1.3) that the civil law adds to and modifies the natural law (*ius naturale*) and universal human law (*ius gentium*). Inasmuch as marriage is the union of a man and woman and is associated with the procreation and rearing of children, it springs from the natural law, but it does not remain there. The civil law determines between whom there can be *matrimonium iustum*. The basis of the Roman idea of marriage is a commonplace conception of an ordinary relationship by which men and women form fairly stable pairs and raise families. Where does *conubium*

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<sup>103</sup> See J. A. Brundage, "Concubinage and marriage in medieval canon law," *Journal of Medieval History* 1 (1975), 1-17.

come in? One may ascribe some impediments of relationship and of status to the natural law, but not all of them. For example, there was nothing natural about the law that prohibited the descendants of senators from marrying actors and their children (*Dig.* 23.2.44). And the denial of *conubium* to persons who were not Roman *cives* was obviously an entirely civil matter.

One should not suppose that there were two kinds of marriage, *matrimonium iustum* and *matrimonium iniustum*, for an invalid marriage is no more marriage than an artificial flower is a flower or an imaginary castle is a castle.<sup>104</sup> Therefore we should not attribute to Roman legislators and jurists a twofold notion of marriage, natural and civil. Laws alter the states of affairs about which they legislate by redefining them. Roman law assumed certain basic relationships (such as marriage) and basic matters of right (such as ownership and contracts) and added further conditions. The relationship between the basic social data and the added stipulations is more complex where *intention* is decisive, for the laws fix and institutionalize differences that would otherwise be (and probably once were) determined by simple intention. Moreover, the legal system turns upon itself, as it were, for by changing what it possible the law determines what choices are available, and in so doing it conditions the intentions of those making the choices. One's intentions are affected, really or notionally, by what the law says one may do.

The point is not that the law recognizes some common, non-civil form of marriage, but that civil law adds its own modifications or determinations to what marriage is from a merely anthropological point of view. Marriage is basically a relationship whereby, normally and typically, a man and a woman agree to live together permanently (other things being equal) and to raise a family as his posterity. From this point of view, a man who lives with a woman temporarily, without intending to raise a family or to pass on his property to the issue of the union, is not married to her. His intentions (his lack of marital affection, in other words) distinguish this relationship from marriage. Civil law then adds its own, artificial conditions of validity.

The chief effect of the civil additions is to determine under what conditions children are legitimate. For example, the

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<sup>104</sup> Here I follow E. Volterra, "Iniustum matrimonium," in *Studi in onore di Gaetano Scherillo* (1972), vol. 2, 441-70.

children will be illegitimate if the man and woman are deemed to be of unequal status. This law is in part an institutionalization of a customary practice, for men of high standing would normally choose women of low standing when they seek only companionship and sexual consolation and not to raise a family and to create posterity. But the effect of these laws is to determine artificially when the offspring of such a union are *not* the man's children (his *liberi*). Since she cannot be his wife, his intentions towards her are at least notionally (and if he has any sense, really) different. He should regard her as his mistress or concubine, and the law deems him to lack marital affection toward her. Contrariwise, the impediment of inequality makes it opportune for a man who merely wants to shack up with a woman to choose someone who is not his equal but his inferior, for then it will be clear to everyone what his intentions are and that she is not his wife. Thus the laws alter the facts, but they do not so much create new distinctions as delineate exactly where old distinctions should be made. Thanks to the laws, a man *knows* how to distinguish between his own *liberi* and his merely biological offspring.

The recursive nature of law is manifest in Justinian's *Novel* 74 from AD 538, which determined that marriages of all except the humblest citizens would henceforth not be valid without documentation. The new law, as Justinian recognized, went against the principle of long standing that marriages could be contracted by affection alone, but this did not prevent Justinian from saying that henceforth persons who had married without documentation "shall not be considered to have come together with marital affection" (*Nov.* 74.4.2). Once this law was established, any man who lived with a woman without documentation would show thereby that he did not regard her as his wife. In other words, Justinian had incorporated (temporarily, as it turned out) nuptial documentation into the flexible notion of marital affection.

The Latin Fathers saw marriage in a new light, for they considered marriage to be not so much a social fact as a compact.<sup>105</sup> To get married, from their point of view, was to bind one's self voluntarily to one person of the opposite sex. The

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<sup>105</sup> A compact, in this sense, is both more and less than a contract: more, because it is not necessarily dissoluble by mutual agreement, as a contract is by nature; and less, because what precisely one must agree to is not defined.

marriage itself, and not only its consequences, was a matter of right (of *ius*). This attitude to marriage entailed a greater emphasis on the initial act of becoming married, and there was, correspondingly, a reduced emphasis on the experience (rather than the obligations) of being married. The Latin Fathers saw marriage in this way because of three closely related convictions, namely: that in marriage two persons become as it were one person; that each spouse owes to the other the “conjugal debt;” and that marriage is indissoluble.

## CHAPTER TWO

### ROMAN LAW: THE DISSOLUTION OF MARRIAGE

The jurist Paul tells us that a marriage is dissolved by divorce or by death or when either of the partners is taken captive or becomes servile in some other way (*Dig.* 24.2.1). The dissolution of marriage by death need not detain us, but it should be noted that Paul treats dissolution because of captivity as something distinct from divorce. Let us consider the case of captivity first.

#### *Captivity*

The rationale regarding captivity seems to have been that in such cases there was no longer *conubium* between a man and his wife, for a citizen who was taken captive by a foreign power not only lost his citizenship but was regarded in law as a slave.<sup>1</sup> Thus Paul assimilates cases of captivity to those of slavery. Slaves did not possess *conubium*, and there could be no *conubium* between a free person and a servile one because of their inequality. However much a captive's wife might wish to remain married to him, and even if she remained in her husband's home, in law the marriage ceased (*Dig.* 49.15.12.4). If he returned to Roman territory, the right known as *postliminium* entitled him to recover his rights and duties and his property in land and slaves. His position in this regard would be as if he had never been taken captive. Marriage was not restored automatically, although the partners could restore it by agreement.

Scholars have variously interpreted the two principal texts on the restitution of a marriage after the return of a captive. Pomponius explains that when a man's son returns from captivity, by *postliminium* the son recovers his rights (his *ius*) and his father recovers the son. Pomponius adds, "A husband does not recover his wife by right of *postliminium* in the same way as a father recovers his son, but the marriage may be reinstated

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<sup>1</sup> Note that one cannot be sure whether a rationale of this kind really preceded and motivated the law or, on the contrary, arose after the law when persons (especially jurists) reflected upon it and tried to make sense of it.



by agreement.”<sup>2</sup> Paul provides a more expansive version of the same doctrine: “A wife cannot be recovered by right of *postliminium* in the same way as a son is by his father, but only if she wishes this and if she has not yet . . . married someone else. But if she is unwilling to remarry although there is no valid reason why she should not, she is liable to the penalties for divorce.”<sup>3</sup> The final phrase, whatever else it may mean, suggests that the woman’s refusal was assimilated in some respects to divorce.

Both these texts are ambiguous. On the one hand, they may mean that *postliminium* does not apply to marriage at all. On the other hand, they may mean that it does apply but not *in the same way* as it does to fatherhood. According to one interpretation, therefore, whereas the application of *postliminium* presupposes that the rights in question have been in suspension, marriage ceases entirely to exist. If the partners wish to be married, therefore, they must marry again, and a new marriage is then formed by a fresh act of agreement. Against this, Corbett argues that *postliminium* applied to marriage but was subject to the agreement of the other partner.<sup>4</sup> Corbett has in turn been criticized by Jane Gardner, who argues that marriage is fundamentally different from the rights automatically restored by *postliminium* insofar as under classical Roman law either spouse was always free even under normal circumstances to terminate the marriage. “If one partner was taken captive,” she argues, “there could be no automatic retention of rights, since this would conflict with the liberty of the other partner to end the marriage at any time.”<sup>5</sup>

The question at stake here is this: either *postliminium* applied to marriage but was subject to agreement; or *postliminium* did not apply, and the marriage, having ceased, could be recreated by agreement. But nothing seems to depend upon which answer one adopts. To induce from the laws a rationale that does not appear there or even in the sayings of the jurists is a

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<sup>2</sup> Dig. 49.15.4.1: “Non ut pater filium, ita uxorem maritus iure postliminii recipit; sed consensu redintegratur matrimonium.”

<sup>3</sup> Dig. 49.15.8: “Non ut a patre filius, ita uxor a marito iure postliminii recuperari potest, sed tunc, cum et voluerit mulier et adhuc alii *post constitutum tempus* nupta non est: quod si noluerit nulla causa probabili interveniente, poenis discidii tenebitur.” The phrase in italics is presumed to be a Justinianic interpolation.

<sup>4</sup> P. E. Corbett, *Roman Marriage* (1930), pp. 214–15.

<sup>5</sup> F. Gardner, *Women in Roman Law and Society* (1976), p. 88.

procedure that may be reasonable and even necessary (for the sake of inquiry) but always risky.

*Divorce in classical law*

As we have seen, the law regarded a spouse who had been taken captive or made servile as no longer existent. It was as if he or she had died. In cases of divorce, on the contrary, the two partners separated or “went different ways” (for such is the meaning of the verb *divertere*, from which *divortium* derives). In other words, they dissolved their partnership and became marriageable again. Thus a man may be said to repudiate his fiancée but not to divorce her, for they cannot be separated before they have come together.<sup>6</sup>

The word *divortium* usually denotes the deliberate termination of a marriage by some recognized means.<sup>7</sup> Divorce might come about either unilaterally, when one spouse repudiated the other, or bilaterally: that is, by mutual agreement. The Christian emperors determined what where the legitimate grounds for repudiation. Again, a divorce might occur in response to something of which the repudiated spouse was culpable, or it might occur amicably (*divortium bona gratia*). In the latter case, no accusation of fault was involved.

Scholars often assume that divorce by common consent and divorce *bona gratia* were one and the same, and in many contexts this seems to be correct. Justin II, for example, notes that in Latin consensual divorce is said to be *bona gratia* (*Nov.* 140, AD 566). Nevertheless, the phrase clearly has a different sense elsewhere. According to Justinian, divorce *bona gratia* is not divorce by mutual consent, but rather divorce with good cause but without fault (*Nov.* 22.4, AD 536). He gives a wife’s repudiation of her husband for impotence as an example of divorce *bona gratia*, and says nothing here about her husband’s view of the matter (*Nov.* 22.7). In this context, I take it, divorce *bona gratia* was not necessarily consensual. Rather, it was divorce that was justified by a good cause for which the divorced partner was not culpable. Each partner in such cases would recover the wealth that he or she had contributed to the marriage: that is, the woman recovered the dowry, and the man recov-

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<sup>6</sup> Cf. *Dig.* 50.16.191 and 50.16.101.

<sup>7</sup> See H. J. Wolff, “Doctrinal trends in postclassical marriage law,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 67 (1950), p. 270.

ered any nuptial gift (*donatio ante nuptias* or *propter nuptias*).

Who had the right to dissolve a marriage by divorce? We should expect that the parties who had rights of agreement to marriage would have equivalent rights of dissent, and this expectation is broadly fulfilled by the evidence. However, there are some complications and doubtful areas to be noted. Until Marcus Aurelius, a *pater* could dissolve his children's marriages even against their will. After Marcus Aurelius, a *pater* had to have good cause, and could not dissolve a happy and well established marriage.<sup>8</sup> Those who were *sui iuris* needed no-one's agreement beside their own. Corbett (citing *Codex* 5.17.12 and *Novel* 22.19) argues that a daughter-in-power as well as a son-in-power could dissolve a free marriage without the consent of her *pater*. Against this, Gardner says that a daughter "married in free marriage could, at least until the late classical period [i.e. until the late third century AD], divorce only through her *pater*."<sup>9</sup> Be this as it may, the jurists show little concern for the rights of a woman's *pater* to bring about her divorce except in exceptional circumstances (such as in the case of an insane husband). As to *manus*-marriage, in the early Republic a wife *in manu* could not divorce her husband, and we may presume that she was beyond the reach of her father, but it is probable that in later law she or her *pater* could repudiate her husband, perhaps because of the influence of free marriage.<sup>10</sup>

How did one dissolve a marriage? Although marriage to one person precluded marriage to another, in Cicero's time a spouse who married again was considered to have divorced his former spouse *ipso facto*, by virtue of the implied dissent, and the second marriage was therefore valid.<sup>11</sup> Getting married again was in effect an act of repudiation. We have noted a text from Ulpian regarding the husband and wife who live apart but continue to regard each other with marital honour and affection. Ulpian argues that gifts between them remain invalid as if their marriage endured ("quasi duraverint nuptiae") because it is affection

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<sup>8</sup> See *CJ* 5.17.5 and Corbett, pp. 122–24.

<sup>9</sup> Corbett, p. 242; Gardner, p. 11. Gardner states on p. 11 that a son in free marriage could divorce without his *pater's* consent, but on p. 86 she implies that all persons *in potestate* would need paternal cooperation: "Persons *sui iuris* in free marriage could terminate marriage. Those *in potestate* had to have the co-operation of the *pater*."

<sup>10</sup> See Gardner, pp. 83–84.

<sup>11</sup> See S. Treggiari, "Divorce Roman Style," in B. Rawson, ed., *Marriage, Divorce and Children in Ancient Rome* (1991), pp. 35–36.

that makes marriage (*Dig.* 24.1.32.13). It ought to follow that when marital affection ceased, the marriage ceased to exist in law as well.

In practice, however, one partner normally dissolved the marriage by a making a simple statement of repudiation to the other, or to the other's representative. Gaius notes a couple of standard forms—"tuas res tibi habeto" and "tuas res tibi agito"—but he does not state that any form is essential (*Dig.* 24.2.2). The repudiating party is sometimes said to send notice of the dissent (e.g. *Dig.* 24.3.22.7) or a bill of repudiation (e.g. *CJ* 5.17.6). Under legislation introduced by Augustus in the *lex Iulia de Adulteriis*, a divorce could not be recognized as valid unless an oral or written *repudium* was served in the presence of seven witnesses.<sup>12</sup> Whether the repudiated partner received or understood the statement, however, was a matter of no legal consequence.<sup>13</sup> This procedure was intended to provide proof that a divorce had taken place, and it did nothing to limit the freedom to divorce.

While one normally achieved a unilateral divorce by a notice of repudiation, the precise form that this took was immaterial. According to the jurists, it was the genuineness of the will of those who divorced and not the form of repudiation that counted. Paul explains that divorce requires a settled intention to dissent permanently. Therefore things said or done in the heat of the moment do not bring about divorce, and repudiation must be corroborated by subsequent behaviour. A wife who repudiates her husband in anger, for example, but returns to him shortly afterwards, has not divorced him (*Dig.* 24.2.3). The legislation of Augustus, however, must have made repudiation definite and irrevocable. There is something final about a written document, and it would have been difficult to show that one had prepared and sent a bill of divorce in the heat of the moment and without deliberation.

Insanity vitiated dissent just as it did the agreement to marry. According to Ulpian, the insane person cannot repudiate because he does not know his own mind ("quia sensum non habet": *Dig.* 24.3.22.7). Thus an insane woman cannot repudiate her husband, nor can her *curator*, but her *pater* can repudiate her husband on her behalf (Ulpian, *Dig.* 24.2.4). A sane person is

<sup>12</sup> *Dig.* 24.2.9. See Corbett, pp. 228–39, on the meaning of this text.

<sup>13</sup> See S. Treggiari, "Divorce Roman Style," in B. Rawson, ed., *Marriage, Divorce and Children in Ancient Rome* (1991), p. 37.

legally entitled to repudiate an insane person, but Ulpian counsels that it is better not to divorce in such circumstances, and this for humanitarian reasons. A husband ought to share his wife's and a wife her husband's misfortunes (*Dig.* 24.3.22.7).

It is probable that in the early Republic one could divorce only on specific grounds, but in the classical period the law required no justification.<sup>14</sup> Nevertheless, the notion of "grounds for divorce" was not entirely absent.<sup>15</sup> To repudiate one's spouse without good cause was dishonourable. Moreover, what happened to the dowry after divorce might depend upon who divorced whom and upon whether this was justified. Thus a man might claim part of his wife's dowry if he divorced her with good reason, such as for her adultery.<sup>16</sup>

Amicable divorce (*divortium bona gratia*) appears in a passage from Ulpian qualifying the general law that forbade a woman to manumit within sixty days of her divorce. Manumission is prohibited whether the woman leaves her husband (*divertit*) or on the contrary is repudiated by him (that is, regardless of which partner repudiates the other). Even if she manumits while she is married, this is invalid if she can be proved to have been contemplating divorce at the time, but there is no prohibition if the marriage is dissolved because of her husband's death or because of some punishment imposed upon him, nor if the marriage has ended *bona gratia*. A sequence of texts in the *Digest* says that gifts are allowed between husband and wife when they divorce, and adds that this often happens when someone dissolves a marriage *bona gratia* for such reasons as entry into the priesthood, sterility, old age and military service (*Dig.* 24.1.60–62). Whatever the precise sense of the phrase *bona gratia* may be in this passage, the grounds for divorce were clearly not offences or crimes. The repudiated partner (in these cases, the wife) was not culpable. It seems unlikely, however, that mutual consent was necessary.

#### *The reforms of the Christian emperors*

In AD 331, Constantine defined the offences that justified repudiation and the penalties for unjustified divorce.<sup>17</sup> This

<sup>14</sup> See Gardner, p. 83.

<sup>15</sup> See S. Treggiari, *Roman Marriage* (1991), pp. 461–65 (on causes of divorce) and 471–73 (on attitudes).

<sup>16</sup> See S. Treggiari, "Divorce Roman Style," pp. 38–39.

<sup>17</sup> *Cod. Theod.* 3.16.1, *De repudiis* (*Brev.* 3.16.1).

constitution apparently presupposed that a spouse would repudiate a partner for some stated reason, namely a fault or crime on the other's part. Its aim was to limit and define such reasons. Henceforth, a woman should not repudiate her husband for some *exquisita causa*. The fact that he was drunkard, a gambler or a womanizer, for example, did not constitute valid grounds for divorce. Similarly, a man should not repudiate his wife for just any reason ("per quascumque occasiones"). Repudiation was to be justified only in the case of certain specified crimes. When a woman sought to repudiate her husband, therefore, there should be an investigation as to whether he could be proved to be a murderer, a poisoner (*medicamentarius*) or a destroyer of sepulchres.<sup>18</sup> Similarly, a man seeking to divorce his wife had to prove that she was an adulteress (*moecha*), a poisoner (*medicamentaria*) or a procuress. If a woman divorced her husband on other grounds, her husband could take all her property and she was to be deported to an island. A man who divorced a wife who was innocent of the specified crimes was to restore her dowry to her and should remain unmarried. If he married again, his former wife had the right to seize his home and property and his second wife's dowry. (Such penalties, pertaining as they do to wealth and property, suggest that the law was aimed primarily at the better off.) The law does not require that the man should leave his second (and now impoverished) wife. The inequality of the rules should be noted, for only the man, and not the woman, may divorce his spouse for adultery.

Constantine's law provided the model that his successors usually followed, but there were exceptions. It seems that the pagan emperor Julian introduced some liberalization in AD 363. He may even have completely abrogated Constantine's rules and the penalties for unjustified repudiation.<sup>19</sup>

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<sup>18</sup> Sepulchres were plundered for building materials. The practice may have become more prevalent when Christians began destroying pagan temples. Valentinian, in a novel prohibiting the destruction of sepulchres, explains that the soul of a dead person remains attached in some way to the body's resting place and rejoices in the reverence shown to it (*Nov. Val.* 23, AD 447).

<sup>19</sup> See R. S. Bagnall, "Church, state and divorce in late Roman Egypt," in *Florilegium Columbianum*, ed. K.-L. Selig and R. Somerville (1987), pp. 42–43; and J. T. Noonan, "Novel 22," in W. W. Bassett (ed.), *The Bond of Marriage* (1968), p. 45, n. 5. The evidence consists in an obscure passage by Ambrosiaster (as these scholars note) and in passages from Ambrose and Augustine suggesting that divorce *sine crimine* (i.e. *bona gratia*?) was

The Western emperor Honorius issued a new law on divorce in AD 421 (*Cod. Theod.* 3.16.2). His rules were based on Constantine's, but he recognized that merely moral faults, and not only criminal ones, might be grounds for divorce. In this way, he introduced an intermediate category between divorce without cause and divorce with good cause. A woman who divorced her husband without cause lost her dowry and nuptial gifts, was deported and was denied the right to remarry (*potestas nubendi*). Should she return, she had no right of *postliminium*. Her husband (I presume) might remarry at once. If she divorced her husband because of his bad behaviour rather than for serious crimes, she lost the dowry and gifts and might not remarry. If she remarried, her ex-husband had the right to bring an accusation of immorality against her. We must presume that she was not deported, as she would have been if there had been no grounds for the divorce. (This is the new intermediate category.) If she divorced him for serious and proven crimes, then she regained the right to remarry after five years.

A man who divorced his wife without cause lost the dowry and nuptial gifts and was condemned to perpetual celibacy. His wife might remarry after one year. If he divorced his wife because of her bad behaviour rather than for serious crimes, he lost the dowry but might recover the nuptial gifts he gave to her, and he could remarry after two years. If he divorced her for serious and proven crimes, however, he could recover the dowry and the gifts and remarry at once.

The inequality regarding the intermediate category (i.e. divorce because of a spouse's moral failings) should be noted. A husband who divorced his wife on such grounds had the right to remarry, while a wife who divorced her husband did not. It is arguable, however, that the new rules slightly strengthened to woman's position.<sup>20</sup>

A novel issued by the Eastern emperor Theodosius II in AD 439 (*Nov. Theod.* 12) ruled that whereas marriage could be contracted informally, by agreement alone, marriage could henceforth be dissolved only if notice of repudiation was sent.

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freely available under civil law. The whole matter is discussed below, pp. 126–131.

<sup>20</sup> As Noonan argues in "Novel 22," p. 46. Noonan speculates that Honorius's half-sister, Galla Placidia, may have had some influence here (*ibid.*, pp. 47–48).

(The procedure no doubt included a proper investigation, as required by Constantine.) The reason given is that divorce should be made more difficult for the sake of the children. However, the novel abrogated the harsh penalties imposed by previous laws. In future the penalties should be in accord with the ancient laws and with the opinions of the jurists. Whether Theodosius intended to remove the penalties altogether is not clear, but it certainly looks as though he wished to have the law "returned to a pre-Christian state" (as Noonan puts it), and this only a year after he had issued his code, which contains the constitutions of Constantine and Honorius.<sup>21</sup>

In AD 449, Theodosius issued a new law on divorce that ran along the lines established by Constantine and thus restored the principle that divorce without just cause was forbidden (*CJ* 5.17.8). The legislator notes again that divorce should be made difficult for the sake of the children, but adds that he desires to release from the ties of marriage men and women who are oppressed by adverse circumstances. He says that this is unfortunate but necessary. As in Constantine's law there are two lists, the first giving the reasons for which a woman may divorce a man, and the second the reasons for which a man may divorce a woman. Many reasons occur in both lists, however, and the rules may be condensed in the following way.<sup>22</sup>

*(i) Infidelity*

Either spouse may divorce the other for adultery. She may divorce him for shaming her by consorting with loose women in the common home. He may divorce her for doing any of the following without his knowledge or against his wishes: keeping company with other men; staying out all night; attending games or theatrical shows.

*(ii) Violence within marriage*

Either may divorce the other for threatening his or her life. She may divorce him for wife-beating.

*(iii) Crimes of theft, violence etc. outside the marriage*

Either may divorce the other for being a murderer or a poisoner (*veneficus*), for machinating against the Emperor, for forgery,

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<sup>21</sup> See Noonan, "Novel 22," p. 48. Noonan speculates that this was due to the influence of Theodosius's wife Eudocia, a convert from paganism (pp. 48–49).

<sup>22</sup> Cf. Noonan, "Novel 22," pp. 49–50, and note that Noonan's summary is not entirely accurate. The most serious error is the statement that the constitution "took the substantial step of clearly eliminating consensual divorce." In fact, this constitution does not mention divorce by mutual consent, and we must presume (as stated in Corbett, p. 245) that it continued to be unpenalized.



for stealing from sacred buildings, for the destruction of sepulchres, for harbouring brigands, for kidnapping. She may divorce him for brigandry or cattle-rustling.

According to this law, a woman may divorce an *adulter* just as a man may divorce an *adultera*. This does not mean that a woman, like a man, could divorce her spouse on the ground of his mere infidelity to her. In classical Roman law and in the *lex Iulia de adulteriis*, adultery consists in the extra-marital sexual relations of married women. Thus the paramour of the adulteress is an *adulter* because she is married, regardless of whether or not he himself is married. That a husband was unfaithful to his wife, therefore, did not in itself make him an adulterer.<sup>23</sup>

While the constitution imposed penalties upon persons who divorced without good cause, these were relatively mild. (The distinction between moral and criminal fault had therefore become redundant, and this law did not make it.) A wife who repudiated without good cause lost the dowry and nuptial gifts. She also lost the "power of marrying," but recovered this after five years. A man likewise lost the dowry and nuptial gifts. It is likely that he lost the right to marry and regained it after two years.<sup>24</sup> The old harsh penalty of deportation is not imposed.

As well as unilateral divorce, imperial law recognised consensual or bilateral divorce; that is, divorce by mutual agreement (*communi consensu* or *ex consensu*). The right to divorce in this way seems to have been taken for granted and is rarely mentioned. Anastasius, in AD 497, ruled that where there had been repudiation by mutual consent and the *repudium* contains none of the grounds for divorce recognised by Theodosius and Valentinian,<sup>25</sup> then the woman need wait only one year rather than five before remarrying (*CJ* 5.17.9). (The husband, we must presume, could remarry at once.) Perhaps the clearest formulation of this right is that found in the Roman code of the Burgundians. The code determines that notice of repudiation may be given and a marriage dissolved by the agreement of both parties ("consensu partis utriusque"), but that if a man wants to repudiate his wife when she is unwilling ("uxore

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<sup>23</sup> See S. Treggiari, *Roman Marriage* (1991), pp. 263–64; and Corbett, pp. 141–42. See also Justinian, *Nov.* 134.10, where the married *adulter* is distinguished from the unmarried *adulter*.

<sup>24</sup> See Corbett, p. 245.

<sup>25</sup> I.e., in AD 449, *CJ* 5.17.8.

contradicente”) or a woman wants to repudiate her husband when he is unwilling (“*nolente marito*”), this can only be for certain stated reasons (namely Constantine’s, as recorded in the Theodosian code).<sup>26</sup> Divorce by mutual agreement was permitted under imperial law and carried no penalty until Justinian abolished it in AD 542 (*Nov.* 117.10), and then it was restored soon after Justinian’s death by Justin II (*Nov.* 140).

*Justinian’s laws on divorce and dissolution*<sup>27</sup>

In AD 528, Justinian ruled that a woman or her parents could divorce her husband if he had proved to be incapable of having intercourse with her for at least two years following the beginning of the marriage, but only if his impotence was due to some “natural weakness.” She would keep the dowry, while he would recover the nuptial gift.

In AD 531, Justinian made provision for the spouse, whether male or female, who wished to follow the solitary life of a religious (*CJ* 1.3.52.15). Neither partner was liable to the penalties for divorce. Therefore the partners would recover their respective properties: the wife would keep the dowry, and the husband would retain the nuptial gift. As far as the partner who was left was concerned, the partner who had become a religious was “useless.” It was as if the latter had died. Any agreement made in the event of the latter’s death, therefore, came into effect. Similarly, when a man left his wife to become a monk, then she (like the widow) was not allowed to marry for one year. This was to obviate doubts about paternity.

A constitution of AD 533 (*CJ* 5.17.11) supplements the laws of Theodosius II on divorce (that is, *CJ* 5.17.8, AD 449). Justinian begins by bringing into the orbit of the law marriages entered into by marital affection alone, without dowries and dotal documentation. It should be remembered that the chief penalty for divorce without proven good cause under the Theodosian rules was loss of the dowry, which the injured party kept. This would not apply to marriage “by affection alone,” for in such cases there was no dowry. Justinian now rules, therefore, that if a man who has been married to a woman by affection alone divorces her without good cause, he must pay her one quarter

<sup>26</sup> *Lex Romana Burgundionum* 21.1–3, *MGH Leges* 2.1, p. 143.

<sup>27</sup> The following is indebted to J. T. Noonan, “Novel 22,” in W. W. Bassett (ed.), *The Bond of Marriage* (1968), 41–90, although I differ from Noonan on several matters of detail.

of his property up to a maximum of one hundred pounds. The same applies to a wife who rejects her husband. The constitution also adds three new grounds upon which a man may divorce his wife, namely: procuring an abortion, bathing with men with libidinous intent, and attempting to marry another man. All three causes are forms of infidelity.

These constitutions were included in the revised version of the *Codex*, published in AD 534. More extensive marriage law appears in two of the subsequent novels: *Novel 22* (AD 536) and *Novel 117* (AD 542). Only those parts of these novels that pertain to the divorce or dissolution of marriage concern us here.

In the preamble to *Novel 22*, Justinian explains that the ancients did not concern themselves sufficiently with marriage and remarriage, so that men and women were free to remarry without penalty. He notes that the emperors Theodosius II and Leo I<sup>28</sup> did legislate extensively in this area, as he himself has done; but now he is going to emend and improve these laws.

Justinian explains that because marital affection makes marriage, dotation is not necessary. Once marriage has been contracted, whether from affection alone or with the added formality of a dowry and a dotal gift, it may subsequently be dissolved, with or without penalty, for “of those things that occur between human beings, whatever is bound is soluble.” He himself, Justinian notes, was the first legislator to prescribe penalties in the case of marriages entered into without dotation.

Justinian’s point is that since marriage is a human bond created by human affection, it must be soluble. He apparently alludes to Plato’s *Timaeus*, where the phrase “whatever is bound is soluble” occurs. Plato means that the gods whom the Demiurge makes are neither mortal nor absolutely immortal, for while on the one hand everything that the Demiurge himself makes is indissoluble, on the other hand whatever is bound is soluble.<sup>29</sup> Justinian means that only divine things are absolutely permanent, while human ones are by nature impermanent. There is a certain unconscious irony here, for the dictum “what therefore God has joined together let not man put asunder” (Mark 10:9) implies that it is really God who binds husband and wife together, and therefore seems to imply that marriage is indissoluble. (This was how the text came to be understood in the West.)

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<sup>28</sup> Leo’s laws on marriage have not survived.

<sup>29</sup> *Timaeus* 41a–b.

Justinian does not say that marriage is dissoluble only on certain grounds. On the contrary, he admits that marriages can be dissolved, and adds that dissolution may be licit or illicit. Divorce without good cause is illicit and should be penalized, but it really is divorce: the marriage has ended. This must be so, for divorce is as much as “social fact” as marriage. Roman legislators sometimes punished those who divorced without good cause, but they never tried to argue that persons who had divorced were not really divorced but still married.

Having shown that divorce is always possible, Justinian distinguishes four kinds of divorce: divorce by mutual agreement; divorce with good cause that is said to be *bona gratia*; divorce without fault, and therefore without good cause; and divorce with good cause that is not *bona gratia* but rather on the ground of some fault (*Nov.* 22.4).

Of the first category he says nothing more, but proceeds to the grounds for divorce *bona gratia*. As we have noted, the right to divorce by mutual consent was usually taken for granted and was rarely contested.

The first provision for divorce *bona gratia* regards the spouse who elects to follow the better life of chastity and solitude. As before, Justinian starts from the premise that the partner who converts has effectively died from the other’s point of view (*Nov.* 22.5).

The next ground for divorce *bona gratia* is the husband’s impotence. Here Justinian emends the ruling of AD 528 (*CJ* 5.17.10) by raising the period from two years to three. This is because it has become clear since he issued the previous law that a man who has been impotent for two years can subsequently beget children. It should be remembered that what is in question here, as the earlier law makes clear, is impotence arising from natural causes and dating from the beginning of the marriage (in other words, a natural failure to consummate).

Justinian counts as divorce *bona gratia* the dissolution of a marriage on the ground that one of the partners, whether it be the husband or the wife, has been taken captive by a foreign power (*Nov.* 22.7). Constantine had ruled in AD 337 that a wife whose husband had gone on a military expedition could not remarry with impunity until she had had no news of him for four years (*CJ* 5.17.7), but this did not affect the ancient principle that the known captivity of one partner dissolved the marriage at once. The rationale for this (at least according

to the jurists) was that the captive was effectively a slave, and that there could not be a valid marriage between a free person and a slave. Justinian now finds this reasoning to be scrupulous and subtle.<sup>30</sup> Having considered the matter "more humanely," he rules that the marriage should not be dissolved as long as it is known that the captive survives. Otherwise, a husband who remarries will lose the nuptial gift, and a wife who remarries will lose her dowry. If it is not known whether the captive survives or not (as was likely to be the case), the other should wait at least five years, but may then remarry with impunity. There is no need in such cases to send a bill of divorce. Justinian does not rule that remarriage while the captive is known to be alive or before five years have passed is invalid, and the penalties are mild. No provision is made for the captive to forcibly reclaim his spouse.

*Novel* 22 contains little that is new with regard to the faults justifying divorce. Here Justinian repeats the provisions of Theodosius II together with his own additions of AD 533: that is, the three added grounds for which a man may divorce his wife, and the provisions for the case of marriage by affection alone.<sup>31</sup>

In *Novel* 117 (AD 542), Justinian again comprehensively defined the legitimate grounds for divorce, affirming that thenceforth there were to be no grounds other than those stated here. The laws of his predecessors and his own laws, he noted, made it easy to divorce and admitted grounds that were unworthy (*Nov.* 117.8). These new laws implicitly abrogated many previous laws, including some of Justinian's. The grounds for divorce were fewer. In particular, most of the grounds that involved some extra-marital crime (such as the violation of sepulchers and cattle-rustling) were eliminated. The only extra-marital crimes remaining involved treason against the Emperor. This will become apparent in what follows.

According to the new law, a man may divorce his wife without incurring any penalty on the following grounds: if she is privy to machinations against the Emperor and fails to inform her husband; if she commits adultery; if she threatens her husband's life in any way, or is aware that others are so doing and fails to inform him; if she dines or bathes with other men against her husband's wishes; if she stays away from home against

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<sup>30</sup> See also *Dig.* 24.2.6, a text from Julian amended and supplemented in accordance with Justinian's legislation.

<sup>31</sup> *Nov.* 22.15–18. Cf. *CJ* 5.17.8 and 5.17.11.

her husband's wishes, unless at her parents' home; and if she attends public shows or games and her husband forbids this or is not aware of it (*Nov.* 117.8).

A woman may repudiate her husband with good reason on the following grounds: if he is involved in machinations against the Emperor or if he is privy to such and fails to report the matter to the Emperor; if he threatens her life in any way, or if he is aware that others are so doing and neither informs his wife nor prosecutes them; if he threatens her chastity by attempting to make her commit adultery; if he attempts to prosecute her for adultery but is unsuccessful; and if he keeps a mistress in the matrimonial home, or even in the same city if he persists in so doing despite censure (*Nov.* 117.9).

Theodosius II made wife-beating a just cause of divorce, but Justinian now excludes this ground. A man who has beaten his wife, unless he did so on some ground that would justify his divorcing her, should give to his wife in compensation an amount equal to one third of the nuptial gift, but such beating does not justify her divorcing him (*Nov.* 117.8).

Justinian's most radical innovation in this novel is his abolition of divorce by mutual consent, except in one case: namely, when persons divorce because of a yearning for chastity. Penalties are prescribed for the person who, having divorced for this reason, remarries or behaves licentiously (*Nov.* 117.10), but Justinian does not say or imply remarriage is ever null.

Justinian is rather strict regarding the wife of a soldier who has failed to return from a campaign. He now rules that she may not remarry until she can be sure that her husband is dead. If she has had no news about him, therefore, she may not remarry, regardless of how long she has waited. If she does get news of his death, the matter must be confirmed with the proper authorities. After this, she must wait one year before she can remarry. A woman who marries before the year is up risks being prosecuted for adultery, and her new husband likewise. If she remarries after giving false testimony that her husband is dead, and he returns, then he may reclaim his wife (*Nov.* 117.11).

In the same novel, Justinian notes three further reasons for which a marriage may be dissolved with impunity, merely affirming that in regard to these his previous legislation stands. They are impotence of the husband,<sup>32</sup> entry of either partner

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<sup>32</sup> I.e. non-consummation. See *CJ* 5.17.10 and *Nov.* 22.6.

into the monastic life and captivity (*Nov.* 117.12). These were three grounds for divorce *bona gratia* prescribed in *Novel* 22. Only the second of these grounds calls for some additional comment here.

In AD 535 (*Nov.* 22.5), Justinian had noted that either a husband or a wife may dissolve a marriage to pass over to the better life of solitude and chastity, having first compensated the remaining partner in a small way. There is no explicit reference to monasteries here, although this is probably what "solitude" implies. The substantive part of the text makes the following provision: that if an agreement has been made whereby one party was to benefit when the other dies, and the latter has dissolved the marriage in order to answer the vocation to chastity, then the agreement should come into effect. For since the dissenting party has chosen to leave one way of life to follow another, this party has died as far as the marriage is concerned. The provisions made here are essentially the same as those of an earlier constitution (*CJ* 1.3.52.15, AD 531). In neither of these laws, however, is it said that the divorce requires mutual consent. In *Novel* 117, however, Justinian abolishes divorce by mutual consent except when the partners are motivated by their yearning for chastity (*Nov.* 117.10). Divorce for this reason, therefore, is regarded as an instance of divorce by mutual consent. There are two problems of interpretation here. First, is divorce for the sake of chastity always the same as divorce for the sake of conversion to the monastic life? Second, did *Novel* 117 require or assume that a marriage could be dissolved for the sake of conversion to the monastic life only if there was mutual consent? And if so, was this an innovation?

The legislator determines the consequences of justified divorce for the repudiated partner in each case. These usually involve the loss both of nuptial gifts and dowry and of a further proportion of his or her property. This wealth goes to the innocent party and to the dependent children, if any. A man who divorces his wife without good cause not only loses the dowry and the nuptial gift but suffers an additional fine. The penalty for a woman who divorces her husband without good cause is severe: she is to be sent to a monastery for life. Her ex-husband retains her dowry, two thirds of her property goes to her children and the remaining third to the monastery (*Nov.* 117.13).

Justinian rectified the inequality in AD 548, when he

determined that the penalties for men and for women should be the same because equal crimes deserve equal punishments (*Nov.* 127.4). In keeping with this, Justinian's last piece of marriage legislation, issued in AD 556, ruled that anyone, whether man or woman, who dissolved a marriage for reasons other than those determined in *Novel* 117 was to be sent to a monastery for life, and that his or her property was to go proportionately to the monastery and to the descendants or ascendants, "lest because of this contempt the judgment of God should be contemned and our law transgressed." The prohibition of consensual divorce was repeated (*Nov.* 134.11).

In the same novel, Justinian sets out a revised procedure for cases of adultery (*Nov.* 134.10). First, the penalties for adultery determined by Constantine are to remain in force. Second, if a man who commits adultery is married, his wife takes the dowry and nuptial gift. (The point of this rule is unclear. It seems to presuppose that the woman has divorced her husband, but then she would get the dowry and nuptial gift in any case.) Third, an adulteress is to be beaten and sent to a monastery. For a period of two years, her husband may take her back if he wishes, but if he still has not done so after two years, or if he dies in the meanwhile, she receives the tonsure and the habit and remains in the monastery for the rest of her life. Two thirds of her property go to her descendants and one third to the monastery. Justinian seems to have intended to create a second chance and thereby save some marriages.

Justin II, Justinian's successor, maintained Justinian's legislation on divorce with one important exception: divorce by mutual consent. The novel in which Justin restores this right reveals much of the attitude of the Christian emperors to the permanence and dissolution of marriage (*Nov.* 140, AD 566). He first affirms the dignity of marriage, noting its importance as the means by which humankind perpetuates itself and the Republic is maintained. It is his earnest wish that all marriages should be happy and fortunate and free of division. Certainly, there should be no divorce without good cause. But with so many marriages, conflicts inevitably arise. A remedy is needful, especially when husband and wife regard each other with implacable hatred and their continued cohabitation has become intolerable. This is why the ancient laws permitted men and women to divorce by mutual agreement (or *bona gratia*, as one says in the mother tongue). Justinian abolished this



right, but his was a stern judgment, and one made without consideration for human weakness. Until now, Justin has maintained Justinian's prohibition, but many persons have come pleading to him, telling him how their homes are full of strife even though they have no legal grounds for divorce. Such persons are sometimes beyond any hope of reconciliation and may turn to violence and even murder. What is the point of such marriages? No children are begotten from them.

While leaving Justinian's other laws intact, Justin now restores the ancient right of consensual divorce. Since the partners contracted marriage by mutual affection, it is fitting that they may dissolve it by dissent and by mutual agreement to part, provided that they send formal notices of repudiation.

*Roman law and the Christianization of marriage*

Corbett has spoken of "the successive efforts made by the Christian Emperors to keep their subjects within the bounds of holy matrimony."<sup>33</sup> Scholars have usually assumed that these efforts were an attempt to bring Roman law more into line with Christian teaching, and have given a range of answers to the question this raises, namely: why did the legislation remain so much at variance with the doctrine of the Church? There is nothing in Roman law to suggest that marriage is indissoluble. Moreover, if Jesus permitted divorce on any ground at all, it was only on the ground of *porneia*. Roman legislators, on the contrary, permit divorce on many grounds.

In an important article published in 1968, John T. Noonan took a fresh approach to this problem.<sup>34</sup> "The customary perspective," Noonan writes, "from which the Roman law on divorce in Christian times has been viewed is from a supposed Christian position on divorce, which the Roman law is seen as reflecting, rejecting or accommodating." Noonan asks instead: "What do we know of the Christian teaching on divorce from the laws of the Christian emperors?"<sup>35</sup> Noonan thus presupposes that the legislators were influenced by Christian teaching, but he does not beg the question of what this teaching was.

More recently, R. S. Bagnall has suggested that Christianity

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<sup>33</sup> *The Roman Law of Marriage*, p. 243.

<sup>34</sup> "Novel 22," in W. W. Bassett (ed.), *The Bond of Marriage* (1968), pp. 41-96.

<sup>35</sup> *Ibid.*, p. 41.

hardly influenced the Roman law of divorce at all.<sup>36</sup> He argues that the Roman legislation on divorce was motivated by matters such as “prudential considerations for family property” that had “nothing in common with the dogmatic basis of the Christian view of marriage.” This seems to me to be correct as far as it goes, but we must not assume that the Church’s view of marriage had a “dogmatic basis.” Nor should we assume that the emperors were simply following ancient pagan or secular paths. They aimed to be Christian. It was the Christian emperors, beginning with Constantine, who introduced the restrictions on divorce, and Julian the Apostate seems to have removed them. We cannot explain the difference between the divorce law of the Christian emperors and the supposed teaching of the Church in terms of the respective autonomies of Church and State.

What was the attitude of the Christian emperors to divorce? What was the underlying rationale for their reforms? Their aim was to make divorce more difficult, and to ensure that persons did not divorce without good cause. Insofar as they provided a rationale for these aims, it was chiefly prudential and humanitarian. That is to say, they discouraged divorce for the benefit of the children, but they also acknowledged that for various reasons of welfare, persons should sometimes be permitted to divorce and remarry.

Thus Theodosius declared in AD 449 that divorce should be made difficult for the sake of the wellbeing of children, but that the dissolution of marriage, although unfortunate, was necessary in certain cases. The law should provide the means whereby those who are oppressed may be set free (*CJ* 5.17.pr.-1). Justinian rejected the principle that the captivity of one spouse automatically dissolved his or her marriage and set the other spouse free to remarry, and he tells us why: he had taken a more humane view of the matter (*Nov.* 22.7).

Justinian was zealous in his efforts to discourage unjustified divorce, and his legislation on the subject became progressively more stringent. There is no reason to doubt that he saw this as his religious duty. In what proved to be his last word on the subject, he ruled that anyone who dissolved a marriage on any ground other than those he had permitted was

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<sup>36</sup> “Church, state and divorce in late Roman Egypt,” in *Florilegium Columbianum*, ed. K.-L. Selig and R. Somerville (1987), pp. 45 ff., esp. pp. 45–46 and 52–54.

to be sent to a monastery for life. He did so "lest because of this contempt the judgment of God should be contemned and our law transgressed" (*Nov.* 134.11). When Justin repealed Justinian's prohibition of consensual divorce, however, his reason was again humanitarian. He would have preferred all marriages to be happy, but some were the source of so much pain that a remedy was needed (*Nov.* 140).

The Roman emperors assumed that the reason for divorcing was to remarry. The notion that divorce (even valid divorce) leaves the partners still married to one another was foreign to them. Any person, therefore, who repudiated his or her partner with good cause was free to remarry. And even when the punishment for illicit repudiation was loss of the right to marry (*potestas nubendi*), the other spouse was normally free to remarry. In short, we do not find in Roman law the idea of the marriage bond. As Noonan has argued, Justinian's "guiding thought" in the matter of divorce was the principle he expressed in *Novel* 22: namely, that "of those things that occur between human beings, whatever is bound is soluble."

All this is strikingly different from what we might call the "normative Western position." According to this, divorce is permissible only on the ground of adultery, and even then the spouses cannot remarry because they are somehow still married. The guiding thought of men like Augustine was the premise that marriage not merely should not but *cannot* be dissolved: to leave one spouse and to marry another was to be guilty of adultery or bigamy, and therefore the new marriage was not valid. The prohibition of remarriage was absolute. This doctrine came from the injunctions of Jesus (Mark 10:11–12, etc.), and it led Augustine to posit a marriage bond analogous to the *sacramentum fidei* conferred in baptism. It was a doctrine that lent itself to theological speculation, and its justification was scriptural and religious but by no means humanitarian. No-one claimed that the doctrine made persons happier in this life. From this point of view, for example, if the missing soldier or even the prisoner of war at length returned, he could expect his wife to be returned to him and her new marriage to be annulled whether she liked it or not.<sup>37</sup>

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<sup>37</sup> See Pope Leo I, *Epist.* 159.1–4, *PL* 54:1135–37; Gratian (citing Leo), C.34 q.1 c.1, (1256–57). Some medieval theologians deduced, as a matter of simple logic, that if a marriage has been annulled for impotence and the man then remarries and is proved to be potent, the first marriage may

There is good reason to suppose, however, that this was not what the Christian emperors knew as the teaching of the Church. Justinian was educated in theology and he tried to make sure that his legislation was orthodox. His laws cover matters of doctrine as well as of ecclesiastical authority and discipline.<sup>38</sup> As William Bassett has remarked, "the fact that the canons of the councils are found side by side in the Code with the elaborate divorce legislation bears out the conclusion that contradiction was not to be expected."<sup>39</sup>

As we shall see, some of the Latin Fathers insisted that remarriage after divorce was permitted in human law but not in God's law. This was a theological opinion about civil legislation, and the beginning of a protest movement, but it does not follow that the Roman laws in question were made without regard to Christian teaching. Pope Gregory argued that the right to dissolve a marriage to enter a monastery existed in human law but not in God's law, but Justinian's motives for allowing divorce on these grounds were devoutly religious.

I do not suggest that the divorce law of the Christian emperors was simply a civil promulgation of the Church's teaching. The legislators were concerned chiefly with civil welfare, and jurisprudence, like philosophy, was an ancient science with its own traditions. I do suggest, however, that they aimed to bring the law of divorce into line with Christian teaching, but that what they knew as the Christian doctrine of marriage was less dogmatic and less theological than the doctrine of men like Tertullian, Ambrose, Jerome and Augustine. The permanence of marriage (like the proper submission of inferiors to their superiors and the generosity of superiors to their inferiors), seemed to them to be one of the virtues that Christianity stood for. This was what God expected of us. It was a part of the righteous life. But it seemed sufficient to understand the expectation in largely humanitarian terms. Likewise, Christian children should respect and obey their parents, but not always and absolutely and without exception. The emperor's attitude to marital values was similar to the attitude of many conservative Christians in America today to family values.

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have to be reinstated: see Alexander of Hales, *Glossa in librum IV Sent.* 34.5; Thomas Aquinas, *IV Sent.* 34.2, resp. Cf. Gratian C.33 q.1 c.2 (1149); and X 4.15.5 (705-6).

<sup>38</sup> See, for example, *Cod.* 1.1-10, and *Novv.* 3, 6, 7, 9, 11 etc.

<sup>39</sup> In *The Bond of Marriage* (1968), p. 94, commenting on Noonan's article "Novel 22."

In the late fourth and early fifth century, the “normative Western position” was becoming established not throughout the Church but in some provinces of the Western Church. North Africa was an important center for this development, and Augustine was its most influential proponent. We shall piece together what we can of this development in due course. The point to note here is that this position was one way (although not the only way) of affirming that marriage is in a special way holy. First, it set marriage apart from those domestic and secular relationships with which it seemed to have much in common, namely family relationships (such as fatherhood) and contractual relationships (such as business associations and other forms of *societas*). Marriage then seemed to be rather like an initiation into a sacred condition, and thus Augustine compared it, time and again, to baptism. Second, the position categorically distinguished the Christian view of marriage from the pagan and Jewish views of marriage. Thus Augustine insisted repeatedly that while the Gentiles divorced and remarried freely, there was no such possibility in the Church. Marriage was henceforth one of those things (like baptism and eucharist) to which Christians could look when they needed to know what set them apart from infidels.

This was not the only possible way to Christianize marriage—the nuptial liturgy would offer another route—but it was one very effective way. Measured against these standards, Roman law hardly Christianized marriage at all.

## CHAPTER THREE

### GERMANIC LAW: BETROTHAL AND DIVORCE

#### *The Sources and their Interpretation*

##### *The "leges"*

The laws and codes that the Germanic kings issued during the period from the fifth to the ninth centuries are our chief source of evidence about Germanic marriage in the early Middle Ages, albeit one that is notoriously difficult to interpret.<sup>1</sup> One can supplement this evidence with what can be gleaned from formulae, chronicles and conciliar decrees.

The *leges* are the Latin laws of the Germanic tribes. As I use the term here, it covers not only Germanic laws but also those codes of Roman law which were prepared under the auspices of Germanic kings for their Roman subjects. (The latter are sometimes known as Romano-Germanic or Romano-Barbarian codes.) All written Germanic laws on the Continent (unlike the laws of England) were in Latin, and it is probable that the Germanic kings commissioned Roman lawyers to write them.

The oldest surviving Germanic codes are those of the Visigoths and the Burgundians. The *Lex Visigothorum*, which Reccesvind issued and Ervig revised in the seventh century, was the result of an extended process of revision and augmentation that began with the preparation of the first substantial code under Euric in the late fifth century.<sup>2</sup> In 506, some thirty years before Justinian published his *Digest*, *Institutes* and *Code*, Alaric II is-

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<sup>1</sup> C. Schott, "Der Stand der Leges-Forschung," *Frühmittelalterliche Studien* 13 (1979), 29-55, provides a useful review of *leges* scholarship. R. Buchner, *Die Rechtsquellen* (1953), which surveys Germanic and Romano-Germanic law, covers ecclesiastical sources, capitularies and formularies as well as the *leges*. There are summary treatments of barbarian law in the *Dictionary of the Middle Ages*, vol. 7: see "Law, French: in South" (Reyerson and Henneman), esp. pp. 461-2; and "Law, German: early Germanic codes" (Drew and Rivers), 468-77. See also K. F. Drew, *Law and Society in Medieval Europe* ([collected articles] 1988). On Roman vulgar law in the *leges*, see P. Vinogradoff, *Roman Law in Medieval Europe* (1929), pp. 11-42, and P. Stein, "Roman Law," *Cambridge History of Medieval Political Thought* (1988), esp. p. 41.

<sup>2</sup> *Lex Visigothorum*, ed. Zeumer (1902), *MGH Leges* 1. For a summary of the history of this code, see P. D. King, *Law and Society in the Visigothic Kingdom* (1972), pp. 1-22.

sued a comprehensive code for the use of the Visigoths' Roman subjects. This is the *Breviarium Alaricanum* or *Lex Romana Visigothorum*, whose chief source was the Theodosian code.<sup>3</sup> Alaric was probably motivated in part by his need to conciliate his Catholic, Gallo-Roman subjects, for the Visigoths were at this time still Arian, and the Catholic Franks were already posing a threat to their security. The *Breviary* remained in force for the Roman subjects of the Visigoths only until the mid seventh century, when Goths and Romans became subject to the same law. Nevertheless, it remained in use among the Gallo-Roman population of Aquitaine, which had been under Visigothic rule until the defeat by Clovis's Franks at Vouglé in 507, and it was the chief source of Roman law in Western Europe until the discovery of Justinian's corpus in the high Middle Ages.

In the late fifth and early sixth centuries, Gundobad and Sigismund issued codes both for their Burgundian and for their Roman subjects.<sup>4</sup> The Germanic code is known as the *Lex Gundobada*. The Merovingian Franks conquered the Burgundian kingdom in 534, but because the Franks respected the principle of the personality of law, the Burgundians continued to live under their own laws. The Roman code, which was issued in the early sixth century, was only briefly in force because Alaric's *Breviary* became the written source of Roman law in Burgundy after 534. The *Lex Romana Burgundionum* acquired most of its contents from the Theodosian code, but its organization was original, being modeled on the *Lex Gundobada*.<sup>5</sup>

The earliest code of law for the Salian Franks—the sixty-five title version—is traditionally ascribed to Clovis himself. A number of revisions and versions were made by Clovis's successors and by the Carolingians through to the early ninth century.<sup>6</sup> During this period, the Salian Franks also issued codes for their subject peoples: that is, for the Ribvarian and Chamavian Franks, the Alamanni, the Bavarians, the Saxons, the Frisians, the Thuringians and the Raetians, the last being a romance people

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<sup>3</sup> Ed. G. Haenel (Leipzig, 1849). On the composition of the *Breviary*, see J. Gaudemet, *Le Bréviaire d'Alaric et les Epitome*, = *Ius romanum medii aevi* vol. 1.2.b.aa.ß (1965).

<sup>4</sup> Both the Germanic code (the *Lex Gundobada*) and the Roman code are found in *Leges Burgundionum*, ed. von Salis (1892), *MGH Leges* 2.1.

<sup>5</sup> On the organization of this code, see G. Chevrier and G. Piéri, *Le loi romain des Burgondes*, = *Ius romanum medii aevi* 1.2.b.aa.b (1969).

<sup>6</sup> Ed. Eckhardt, *MGH Leges* 4.1 (*Pactus legis Salicae*) and 4.2 (*Lex Salica*).

inhabiting the region of eastern Switzerland.<sup>7</sup> The code for the Raetians (the *Lex Romana Curiensis*) is a greatly abbreviated version of Alaric's *Breviary*.<sup>8</sup> The others are codes of Germanic law.

In 552, the Ostrogothic kingdom in Italy fell to the Byzantine army of Justinian, but after 568, parts of the territory were taken by the Lombards, whose kingdom was centred on Pavia in the North, while the strip of territory from Rome to Ravenna remained under Byzantine control. (The Lombardic kingdom fell in turn to Charlemagne in 774.) Although the Lombards ruled over a largely Roman population, they did not issue any new code of Roman law. The code of Lombardic law prepared by Rothair in 643 was supplemented and qualified by successive kings, most extensively by Liutprand in the eighth century.<sup>9</sup>

Before the written codes were prepared, Germanic law was unwritten and customary. Even imperial Rome had recognised that established custom constitutes unwritten law.<sup>10</sup> The prologue to the Burgundian code, the *Lex Gundobada*, explains that custom (*consuetudo* or *mos*) of long standing has the force of law ("pro lege habetur"), while what is properly called *lex* is the written law, since this word comes from the verb *legere* ("to read").<sup>11</sup>

There is no way of knowing exactly how the written codes were related to unwritten but customary law, and it is difficult to determine how judges applied the two sources.<sup>12</sup> One should not suppose that there were no unwritten laws. The codes of the Visigoths and the Lombards are fairly comprehensive, and these give us something approaching a complete picture of marriage law. The codes of northern Europe, on the contrary, are patchy and far from comprehensive. The Salic codes do not cover family law and therefore touch only rarely and incidentally upon marriage. The patchiness of these codes and certain other anomalies have led Patrick Wormald to suggest

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<sup>7</sup> *Lex Alamannorum*, ed. Lehmann (1888), *MGH Leges* 5.1; *Lex Baiuvariorum*, ed. von Schwind (1926), *MGH Leges* 5.2. *Leges Saxonum*, *Lex Thuringorum*, *Lex Ribuarum*, *Lex Francorum Chamavorum* and *Lex Romana Raetica Curiensis* are in *MGH Leges* (folio), vol. 5 (1875–1889), and *Lex Frisionum* is in *MGH Leges* (folio), vol. 3 (1863).

<sup>8</sup> See J. Gaudemet, *Le Bréviaire d'Alaric* (1965), pp. 50–60.

<sup>9</sup> The *Leges Langobardorum* are edited by Bluhme and Boretius in *MGH Leges* (folio), vol. 4 (1868).

<sup>10</sup> See *Cod.* 8.52.2 (Constantine) and *Dig.* 1.3.32.1 (Julian).

<sup>11</sup> *MGH Leges* 5.2, pp. 200–201.

<sup>12</sup> In regard to these problems in Salic law, see R. McKitterick, *The Carolingians and the Written Word* (1989), pp. 23–75, esp. 37–38.



that the primary motive for the provision of written law (*lex scripta*) lay in the "ideological aspirations of Germanic kingship" rather than in any practical exigencies. The kings sought to follow the example of Rome and her emperors. For this reason, Wormald argues, much "barbarian legislation . . . gives the impression that its purpose was simply to get something into writing that *looked like* a written law-code, more or less regardless of its actual value to judges sitting in court."<sup>13</sup>

Roman law influenced all the Germanic codes but to various extents. The codes of the Visigoths, Lombards and Burgundians in southern Europe were more Romanized than those of the tribes who settled in northern Europe: that is to say, than the codes issued for the Salian Franks after they had settled in northern Gaul and the codes of those tribes who settled east of the Rhine and outside the boundaries of the Roman Empire. The Goths and Burgundians, as well as the Lombards, found themselves ruling in lands where the majority of the population was Roman and was living by Roman law. Unlike the Franks, they had experienced a prolonged and formative contact with Roman civilization before they established their respective kingdoms. Thus the Burgundians and Visigoths had codes of Roman law prepared for their Roman subjects. The Lombards, on the contrary, seem to have left their Roman subjects to their own devices. The Franks in the North, who were less Romanized than the Goths to begin with, moved into an area in which Roman law and culture were not well established. After their conversion to Catholicism, the Visigoths became closely allied with the Church, and the co-operation of Church and State is apparent both in the councils of the former and in the laws of the latter. The Carolingians established a similar alliance with the Frankish Church, but here the rulers gave their support to Romano-Christian traditions and reforms.

The chief source of Roman law for the *leges* was the code that Theodosius had issued in AD 438, but West Roman vulgar law also influenced the *leges*. This requires a brief explanation.<sup>14</sup> In the period after the classical jurists, and especially during and after the era of Constantine, laws and legal concepts

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<sup>13</sup> "*Lex Scripta and Verbum Regis*," in *Early Medieval Kingship*, ed. P. H. Sawyer and I. N. Wood (1977), 105–138. My quotations are from pp. 106 and 115.

<sup>14</sup> See E. Levy, *West Roman Vulgar Law: the Law of Property* (1951), pp. 1–18.

arose in the Roman Empire that differed from those of classical law and were the product not of imperial legislation but of practice. They were inevitably regional, but one should distinguish them from official provincial law. Vulgarization continued beyond the era of Justinian and, in the West, beyond the fall of the Empire. (All new elements in West Roman law after the fall of the Empire are by definition vulgar.) Our knowledge of these vulgarisms is for the most part indirect; indeed, scholars hypothesized vulgar law to explain elements in Justinian's law and in the *leges*. One may define West Roman vulgar law narrowly as consisting of the additions made in the West; or broadly as the whole law as it was practiced, including its vulgarisms. (I shall use the phrase in the latter sense here.)

The Roman law of the *leges* was not that of Justinian. His corpus was not well-known in western Europe in the early middle ages (with the possible exception of areas under Byzantine influence in Italy). The *Digest* was almost entirely unknown. Nevertheless, St Odo of Cluny's father, a Frank of the ninth century, was said to have known the novels of Justinian by heart,<sup>15</sup> and Gaudemet has argued that the *Epitome Iuliani*, a Latin epitome of 124 of Justinian's novels, was a source of influence as early as the ninth century, and that this influence is apparent in Hincmar of Reims.<sup>16</sup>

#### *Some problems of interpretation*

The scholar who aims to discover Germanic marriage in the *leges* faces a number of severe difficulties, four of which are worth noting here.

In the first place, laws give us a far from complete picture of the practices they seek to regulate. They naturally assume a good deal, and only settle whatever pertains to disputes and matters that need to be defined, limited or changed. This is perhaps as true of Roman law or of the Mishnah as it is of the barbarian laws, but in the latter case the codes are briefer, they are less well supported by other evidence, we have much less evidence about the traditions and chains of thought that

<sup>15</sup> So Odo is said to have recalled in John of Salerno's *Vita s. Odonis* I.5 (PL 133:46A).

<sup>16</sup> See "Le legs du droit romain en matière matrimoniale," in *Sociétés et mariage* (1980), pp. 341 and 358–9. Julian of Constantinople prepared this epitome in the mid sixth century. It was probably intended for use in Italy, for Justinian's novels were promulgated there in AD 554. It has been edited by G. Haenel as *Iuliani Epitome Latina Novellarum Justiniani* (1873).

preceded them, and we do not have the benefit of the writings of jurists.<sup>17</sup> Moreover, it is clearly not the case that Germanic law was entirely reduced to writing, and we have, for the most part, no way of knowing to what degree even *legal* practice observed the written codes.

The fact that the evidence of the *leges* is incomplete and fragmentary invites the interpreter to bring together evidence from as many sources as possible, and to fill the gaps in one source with material from another. But this raises our second difficulty: that of knowing to what degree one should regard the barbarian codes as manifestations of a single Germanic substratum. German scholars in the *Rechtsschule* that flourished from the late nineteenth century to the 1940s tended to assume that there was a universal substratum of Germanic law. For this reason, they exploited a wide and heterogeneous variety of sources—not only the *leges*, but also custom and literature over many centuries—to determine what the common elements were. The same scholars assumed that marriage in all Germanic nations involved the transference of *mundium* or power in exchange for brideprice. They also distinguished three modes of marriage: *Kaufehe* or *Muntehe* (marriage by purchase or the transference of *mundium*), *Raubehe* (marriage by capture) and *Friedelehe* (marriage by mutual consent alone). These suppositions have become deeply entrenched in historiography. Some historians have adopted them uncritically while others have used them as a basis for revision.<sup>18</sup>

Despite the prodigious achievements of the *Rechtsschule*, one ought to regard these supposedly universal norms with some scepticism. While Germanic marriage did typically involve the acquisition of a bride from her kin, and thus was in some sense an acquisition of power over her, the laws do not always

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<sup>17</sup> A jurist, in this context, is one who reflects and comments upon the laws, as opposed to one who makes laws (a legislator). Justinian's *Digest* is a compilation of such writings.

<sup>18</sup> For an account of some of the theories and disputes, see R. Besnier, "Le mariage en Normandie des origines au XIII<sup>e</sup> siècle," *Normannia* 7 (1934), pp. 93–8. On the three kinds of marriage, see R. Köstler, "Raub-, Kauf- und Friedelehe bei den Germanen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 63 (1943), 92–136. For a brief review of the origins and use of this scheme, see S. F. Wemple, *Women in Frankish Society* (1981), pp. 12–13. The theory is assumed uncritically in, for example, J. Brundage, *Law, Sex and Christian Society in Medieval Europe* (1987), pp. 128–29, and C. Gellinek, "Marriage by consent in literary sources of medieval Germany," *Studia Gratiana* 12 (1967), 557–79 (see esp. p. 559).

treat this transference in a formal way as the transfer of *mundium*. A dotation made by the suitor or by his *parentes* on his behalf was central to the normal forms of the transaction, but some scholars now doubt whether brideprice was ever a fundamental form of dotation in Germanic marriage, and even whether it ever existed.

Although the three postulated forms of marriage do correspond to three routes to marriage envisaged in the *leges*, the categories overlap. After an abduction, the abductor might come to an agreement with the woman's family and confer a dowry. The alliance would then become in effect marriage by betrothal (the scholars' *Kaufehe*). Failing this, their alliance was not a marriage in law. The term *Friedelehe* means different things to different scholars, and its use is now more confusing than helpful. When historians posit the triple scheme in isolation from the evidence upon which it was based, the reader may be misled into supposing that it was a scheme to which the Germanic legislators themselves referred, and not what it is in fact: a pattern discerned by modern scholars. The laws are both more heterogeneous and more obscure than this kind of theorizing would suggest.

The laws and institutions of the Germanic peoples varied considerably. According to P. D. King, the assumption that a common and enduring identity lay beneath the apparent diversity of Germanic political structures should be "consigned once and for all to the historiographical curiosity shop, to join other nineteenth-century relics."<sup>19</sup> Nevertheless, in the laws on marriage certain common elements and underlying structures do emerge. The similarities are sufficient, I think, to justify a comparative method that seeks to establish both the general characteristics of "Germanic marriage" and the peculiarities of each code.

Another range of difficulties appears when we attempt to disentangle the three kinds of influence that shaped the *leges*: that is, Roman, Germanic and Christian influence. The three sources did not conveniently come together at the time of the *leges*, and their interaction was no doubt gradual and complex. Even insofar as we can usefully speak of distinct sources, we do not know very much about the state of these sources immediately prior to their presumed interaction. We cannot

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<sup>19</sup> "The Barbarian kingdoms," *Cambridge History of Medieval Political Thought* (1988), p. 147.

safely assume, for example, that everything at variance with Theodosian law was properly Germanic, for we cannot be confident that we know the state of Roman vulgar law in western Europe at this time. It is commonly assumed that the Romano-Germanic codes represent the state of vulgar law at the time and place of their preparation, but this is only an assumption. The *Breviary* is essentially an abridgement of written sources, and it may have been as much the result of textual scholarship as a reduction of current vulgar law to writing. The fact that Alaric probably issued it not to satisfy any practical need on the part of his Roman subjects but rather to convince them that he was a good Roman-style emperor with their best interests at heart does not inspire confidence.

Our fourth difficulty pertains to the questions of what proportion of the population in each kingdom was subject to Germanic law and of what was the extent of Germanic influence. We do not know the relative proportions of Germanic and Roman populations in each territory. In due course, territoriality replaced personality and the notion that there were distinct but cohabiting races passed away.<sup>20</sup> A person's national identity came to depend upon his country of origin, and after the ninth century, no citizen of the Frankish kingdoms was called *romanus*. Roman legal traditions must have continued, especially in southern Europe, but in some respects marriage seems to have become less Roman and more Germanic. For example, the Roman dowry, brought by the wife, was superseded by the characteristically Germanic gift from husband to wife (the *dos ex marito*). It re-emerged later, first in the Midi, Catalonia and Italy, in the eleventh century.<sup>21</sup> It is possible that the re-emergence of Roman-style dotation owed something to the rediscovery of Justinianic law.

Historians of medieval marriage hold that the classical Roman conception of betrothal and of its relation to marriage disappeared in western Europe during the early Middle Ages. Jean Gaudemet has argued that while a number of influences had already threatened this pattern, Germanic traditions swept it away and eventually triumphed.<sup>22</sup> But by what process did this

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<sup>20</sup> See E. James, *The Origins of France* (1982), pp. 30–31 and 39–41.

<sup>21</sup> See J. H. Mundy, *Men and Women in the Age of the Cathars* (1990), p. 88 and ff.; D. O. Hughes, "From brideprice to dowry in medieval Europe," *Journal of Family History* 3 (1978), pp. 276 ff.; and J. Hilaire, *Le régime des biens entre époux dans la région de Montpellier* (1957), pp. 25 and ff.

<sup>22</sup> "Originalité et destin du mariage romain," *Sociétés et mariage* (1980),

influence triumph, and why? In the Midi and in Italy the majority of the population continued to live according to Roman law. We must presume that Germanic law would have applied only to the dominant minority. Perhaps it applied only to those with access to the royal courts. A different situation prevailed in northern France, but even there one would expect the Church to have continued to adhere to Roman law. Moreover, the early medieval betrothal was not much different from that known to the Latin Fathers. Germanic law and custom must have had some influence on marriage in the Church, but it is very difficult to determine the nature and extent of this influence. I doubt that the conception of marriage that prevailed from the ninth to the eleventh centuries and that the canonist Gratian articulated (I have in mind especially the so-called coital theory) owed much to Germanic traditions, and I doubt that the new consensualism of the high Middle Ages, with its distinction between *consensus de futuro* and *consensus de praesenti*, owed much to the rediscovery of Justinianic law and the *Digest*. Peculiarly Christian ideas and exigencies, it seems to me, generated both the coital and the consensual theories. This is a matter that lies well outside the scope of this book.

### *Marriage*

#### *Preconditions*

As in Roman law, there could be no valid marriage between a free person and a slave. Sexual relationships between free women and servile men were regarded with particular severity: the woman might be flogged, enslaved or even burned.<sup>23</sup>

The laws against incest in the codes pertain especially to relationships of affinity. Thus men are forbidden to marry their step-daughters, step-mothers, sisters-in-law and so on.<sup>24</sup> These prohibitions may represent reforms made under Christian or Romano-Christian influence. Liutprand's (Lombardic) laws recognize the relationships of spiritual cognation that arise when a man or woman sponsors someone's baptism. Thus

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p. 163: "déjà menacées par les usages provinciaux et la doctrine ecclésiastique, les notions romaines de fiançailles et de mariage allaient être ruinées par les traditions germaniques, qui peu à peu triomphent dans tout l'Occident."

<sup>23</sup> *Lex Vis.* 3.2.2-3, pp. 133-35; *Lex Gund.* 35.2, p. 69; Rothair 221, pp. 53-54.

<sup>24</sup> Cf. Rothair 185, p. 44; Liutprand 33, pp. 123-24; *Lex Alam.* 39, pp. 98-99; *Lex Bai.* 7.1, pp. 347-48; *Lex Gund.* 36, p. 69.

marriage is prohibited between a man and his *commater* (that is, his child's God-mother), between a man and his God-daughter, and between a man's son and God-daughter.<sup>25</sup>

The most comprehensive treatment of the impediments of relationship is that of the Visigothic code, which forbids sex and marriage within six degrees of consanguinity.<sup>26</sup> Here again we find Romano-Christian influence at work. Under Roman law, the seventh degree was the limit of consanguinity.<sup>27</sup> (This would determine who might be a man's heirs; the impediment to marriage did not extend so far.) Isidore says that consanguinity extends to the sixth degree because there were six days of creation and because there are six ages in a human life.<sup>28</sup> With regard to impediments of affinity, the *Lex Visigothorum* rules that a man may not marry his father's *sponsa* nor the widow of his father, brother or son.<sup>29</sup> Furthermore, even fornication with a woman (such as a concubine) who has had sex with one's father, brother or son is regarded as a serious pollution and may be punished by penitence and perpetual exile.<sup>30</sup> This code treats as incest the marriage of a man to a nun, to a consecrated virgin, to a widow who has taken a vow of continence, and to a penitent.<sup>31</sup>

### *Betrothal*

In their treatment of betrothal, the laws envisage a typical situation in which the girl who is to be married is to begin with in the power of her family, a power that is vested primarily in her father. Marriage is then in essence a contract of acquisition whereby a man acquires the girl from her family. The process may be conveniently divided into four elements: *petitio*, *desponsatio*, *dotatio* and *traditio*.

First, the suitor (the *petitor*) asked for the girl. Second, if

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<sup>25</sup> Liutprand 34, p. 124. On spiritual kinship, see Goody, *The Development of the Family and Marriage in Europe* (1983), pp. 194 ff.; and J. H. Lynch, *Godparents and Kinship in Early Medieval Europe* (1986).

<sup>26</sup> *Lex Vis.* 3.5.1., p. 159; 12.3.8, p. 435.

<sup>27</sup> See *Dig.* 38.10.4, pr.

<sup>28</sup> *Etym.* IX.6.29, ed. Reydellet, pp. 217, 225.

<sup>29</sup> *Lex Vis.* 3.5.1, p. 159.

<sup>30</sup> *Lex Vis.* 3.5.5, pp. 163–64.

<sup>31</sup> 3.5.2, pp. 159–61. Germanic law did not regard the remarriage of a widow or widower as *per se* invalid or improper (see *Lex Vis.* 3.1.4, p. 126; *Lex Gund.* 24, p. 61, and 69.1–2, pp. 95–96), but the Visigoths adopted the Roman *tempus lugendi* (see *Lex Vis.* 3.2.1, p. 133; cf. *Cod. Theod.* 3.8 and *Lex Romana Burg.* 16.1, p. 140).

his petition was accepted, the girl was betrothed to the man by her family. She was the object of this agreement rather than a party to it, and her consent was not always required. The betrothal (*desponsatio*) was a contract whereby the parties agreed that the girl would be handed over to the man as his wife in due course. Some laws, especially those of the Lombards, regard the transaction as an acquisition a power over the girl known as *mundium*. The word *mundium* is the Latin rendering of *mund* or *munt*, meaning "hand." Thus the Germanic *mundium* was exactly equivalent to the old Roman *manus*.<sup>32</sup>

Whereas according to the Roman jurists and under classical and imperial Roman law, agreement alone (*nudus consensus*) was sufficient for betrothal,<sup>33</sup> under Germanic law the betrothal was effective only if it was ratified a donation from the man to the girl or to her family. This is the third element, dotation (*dotatio*). The suitor (or his father or relative or representative) might promise or give the dowry at the time of the betrothal, or this requirement could be fulfilled later.

Finally, the girl's father or family handed her over to the man as his wife, usually within a period agreed in the contract or specified by law. Some of the Germanic peoples, at least, celebrated this last element, the *traditio*, with a nuptial ceremony and perhaps also with a procession to the husband's house (the equivalent of the Roman *deductio*). Graeco- and Romano-Christian elements, such as the *arrha* and the benediction, might occur within this basic form. Since the Germanic dowry was a gift from the husband's side to the wife, the Germanic peoples easily adapted to their own dotal regimes the Roman laws regarding donations made by the woman's fiancé.

The Germanic laws sometimes define betrothal as a promise to marry in the future.<sup>34</sup> The betrothal was in principle a binding agreement (insofar as any agreement can be binding in legal systems where compensation plays so great a part), and it was fulfilled by the *traditio* or handing over of the woman to her husband. Thus it was an integral part of the process of get-

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<sup>32</sup> On *mundium*, see R. Huebner's account, quoted by K. F. Drew in *Notes on the Lombard institutions*, repr. In *Law and Society in Medieval Europe* (1988), pp. IV.86–87, n. 38.

<sup>33</sup> Ulpian, *Dig.* 23.1.4: "sufficit nudus consensus ad constituenda sponsalia."

<sup>34</sup> See e.g. *Lex Vis.* 3.4.2, p. 147: "dato pretio et . . . ante testes factum placitum de futuro coniugio fuerit definitum;" and 3.1.4, p. 126, where the betrothal is called *promissio coniugal*is. These formulations may owe something to Roman influence (cf. *Dig.* 23.1.1).



ting married, and in this respect it was of more consequence than the Roman equivalent. Evidence for this difference is found in the Burgundian codes.

Three laws under the heading "On betrothed girls and women" (*De puellis vel mulieribus desponsatis*) in the Roman code of the Burgundians determine what happens to the *arrha* when a betrothal is broken off.<sup>35</sup> If the woman spurns the suitor and marries another man, the *arrha* that her fiancé paid to her parents must be repayed fourfold. But if the man simply refuses to marry her or if he has failed to fulfil his promise after two years, then she is free to marry another and she retains the *arrha*. These laws came straight from the Theodosian Code.<sup>36</sup>

When we turn to the corresponding section of the *Lex Gundobada*, under the heading "On betrothed women" (*De mulieribus desponsatis*), we find evidence of a more binding kind of betrothal.<sup>37</sup> The law considers an actual case: that of Aunegilde, Fredegisil and Balthamod. The *parentes* of widow Aunegilde had betrothed her to Fredegisil with her consent, and they had already handed over a major part of the dowry, when she (being motivated, we are told, by lust) ran off with Balthamod. Both deserved to be killed, although they were reprieved because it was Easter. Instead of paying the ultimate price, they paid amounts equal to their respective wergelds to Fredegisil. They must have made their crime worse by acting against the wishes of their *parentes*, but the text treats it as adultery and not as abduction. Moreover, the *Lex Gundobada* is lenient towards girls who elope, and it does not prohibit the survival of a marriage created in this way or regard it as a form of abduction.<sup>38</sup>

Despite this example, the strength of the betrothal bond under Germanic law varied from one code to another. This may have depended upon the extent of Christian and of Roman

<sup>35</sup> *Lex Rom. Burg.* 27.1–3, pp. 147–48.

<sup>36</sup> *Cod. Theod.* 3.5.4; 3.5.5 (*Brev.* 3.5.4), interp.; and 3.5.11 (*Brev.* 3.5.6), interp. Whereas *Cod. Theod.* uses the traditional language of *sponsa*, *sponsalia* and *despondere*, the Burgundian version denotes the betrothed woman by the word *desponsata* (from *desponsare*): cf. *Cod. Theod.* 3.5.5 ("qui puellam desponderit alteri eandem sociaverit") and *Lex Rom. Burg.* 27.2, p. 148 ("liceat parentibus puellam *desponsatam* alii matrimonio sociare"). The word family to which *desponsare*, *desponsatio* and *desponsata* belong rarely appears in classical and imperial law but is common in the Latin Fathers: see J. Gaudemet, "Originalité et destin du mariage romain," *Sociétés et mariage* (1980), pp. 159–63.

<sup>37</sup> *Lex Gund.* 52, pp. 85–87.

<sup>38</sup> Cf. *ibid.*, 100 (p. 113), 101 (p. 114) and 12.1–4 (pp. 51–52).

influence. Moreover, the Roman laws on betrothal were readily adapted, *mutatis mutandis*, to the Germanic *desponsatio*.

Under Roman law, a father or guardian who gave a *sponsa* to another man should compensate the *sponsus* by giving him four times whatever had been conferred as *arrha*.<sup>39</sup> If a *sponsus* did not fulfil his promise to marry within two years, the woman could marry someone else with a clear conscience, for the fault lay not with her but with her fiancé.<sup>40</sup> A *sponsus* who failed to fulfil his betrothal promise could not recover any gifts conferred as *arrha* and had to hand over any that had been formally promised but not yet given.<sup>41</sup>

The Lombards and the Visigoths adapted these laws, but in different ways, the position of the Lombards being the closer of the two to that of the Romans. A law in Rothair's code determined what happened if a *sponsus* delayed for more than two years after the betrothal had been formally contracted before fulfilling his promise by marrying the girl.<sup>42</sup> If he failed to do so voluntarily, and not because of some necessity, the agreement was no longer binding on the woman's side. The father or brother of the woman, or whoever was her *mundwald*, might give her to another man if she consented, and the *sponsus* was required to give to the woman herself whatever he had promised as *meta* (a form of dowry) at the betrothal. Except under these circumstances, the agreement was in principle binding on the woman's side, although after a breach of promise the matter could be settled, in characteristically Germanic fashion, by composition (that is, by the payment of compensation). Thus a man who took another's *sponsa* had to settle both with the *mundwald* and with the *sponsus*. The former received 20 *solidi* as compensation and another 20 to avert the vendetta, while the latter received twice what had been agreed as *meta*. The wronged *sponsus* then had no right to further action.<sup>43</sup> Although the agreement was no longer binding on the woman's side if the *sponsus* delayed for more than two years, it probably remained binding, at least in principle, upon him. This is suggested by a law in Rothair's code which says that a *sponsus*

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<sup>39</sup> *Cod. Theod.* 3.5.11 (*Brev.* 3.5.6). The law did not apply if the gifts had been bestowed before the girl was ten years old.

<sup>40</sup> *Cod. Theod.* 3.5.5 (not in the *Breviary*) and 3.5.5 (*Brev.* 3.5.4), interp.

<sup>41</sup> *Cod. Theod.* 3.5.2.

<sup>42</sup> Ro. 178, p. 41: *Des sponsalibus et nuptiis*. This law calls the betrothal *sponsalia*.

<sup>43</sup> Ro. 190, pp. 45–46.

should not be compelled to marry his *sponsa* if she has become leprous, blind in both eyes or demonically possessed after the betrothal.<sup>44</sup> The law implies that he might be compelled to take her as his wife if she were healthy.

The *Lex Visigothorum* also applied a two-year rule, but this code explicitly states that the *sponsus* remains bound by the contract even after two years have elapsed. (The position on the woman's side is not made clear.) The period between the betrothal (*dies sponsionis*) and the wedding (*dies nuptiarum*) should not exceed two years unless either the *sponsus* has been prevented by some necessity or both sides have agreed to a further delay. Any new agreement, however, cannot postpone the marriage for more than another two years. (This arrangement, it seems, can be repeated indefinitely.) Otherwise, a *sponsus* who has failed to fulfil his promise must pay in compensation an amount determined in the contract, but he remains bound to marry the woman.<sup>45</sup>

A law in the Visigothic code under the rubric *De non revocandis datis arris* determines that once a couple has become betrothed and a ring has been conferred as *arrha*, then even if there is no agreement in writing, the promise is binding unless it is dissolved by mutual consent.<sup>46</sup> The point of this law is revealed by the rubric, which says that an *arrha* cannot be revoked once it has been given. When a buyer conferred an *arrha* as a pledge, the vendor was bound by the agreement but the buyer had the right to recover the *arrha* and thereby withdraw from the sale without incurring any penalty.<sup>47</sup> The law *De non revocandis datis arris*, therefore, does not imply that the *arrha* was essential to betrothal. Rather, it determines that where a betrothal has been contracted in this way, the *sponsus* cannot dissolve it by revoking the *arrha*. Here again, the law treats betrothal as a binding agreement (in other words, as a contract).

Although this code allowed a girl the right to marry without her family's consent, she could not marry another man once she had been betrothed. The code was severe on this point. If a *sponsa* married a man other than her *sponsus*, both were to be handed over in servitude to the *sponsus*, together

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<sup>44</sup> Ro. 180, p. 42: "tunc sponsus recipiat res suas, et non compellatur ipsam invitum tollere ad uxorem."

<sup>45</sup> *Lex Vis.* 3.1.4, pp. 125–26.

<sup>46</sup> 3.1.3, p. 124.

<sup>47</sup> 5.4.4, p. 219.

with their property. If her father had promised her to one man and another man had taken her by agreement with her mother, brother or other close relative, this new agreement had no force and the offending relative was to be fined one pound of gold. The same applied if her father had agreed to the marriage and to the dowry but had died before giving her away: his will stood.<sup>48</sup> If the girl's *parentes* (that is, her father or whoever had power over her) gave her to another man after promising her to the *sponsus*, the man was regarded in law as an abductor. He was to be handed over in servitude to the *sponsus*, to whom the *parentes* had to give four times the agreed dowry.<sup>49</sup>

The Visigothic code aimed to restrict the separation (*discidium*) of betrothed men and women in the same way as it aimed to restrict divorce between married persons, and the same rules applied. A fault on one side might free the other party from the agreement and allow him or her to marry another. Failing this, a betrothal could only be dissolved by mutual consent. There was one exception to this rule: a *sponsus* or *sponsa* who was mortally ill had the right to enter the religious life even without the consent of the other party, as long as he or she was sincere and moved by religious devotion, and was not using this as a ploy to evade the marriage.<sup>50</sup>

Salic law, even in the Carolingian period, did not attempt to prevent a betrothed man from withdrawing from the agreement, and it was content merely to state that if he did so, he had to pay 62 1/2 solidi as composition.<sup>51</sup> Under traditional Germanic justice, compensation could usually absolve one from culpability for a crime.

### *Dotation*

Whereas agreement alone sufficed to make a betrothal or a marriage under Roman law, dotation was an essential element of betrothal under Germanic law. The betrothal might precede the conferring of the gift, or it might be confirmed by a token gift such as the *arrha* or the Salic solidus and denarius, but it

<sup>48</sup> *Ibid.*, 3.1.2, p. 123. See also Ervig's addition to 3.4.2, p. 148.

<sup>49</sup> See 3.3.3, p. 141, *Si consentiant raptori parentes de disponata puella*.

<sup>50</sup> See 3.6.3, p. 170 (*Ne inter sponsos discidium fiat*), which applies to betrothal the rules on divorce determined in 3.6.2 (*Ne inter coniuges divortium fiat*).

<sup>51</sup> *Lex Sal.* (100-title version) 96, *MGH Leges* 4.2, p. 169. *Lex Sal. Karolina* 70, *MGH Leges* 4.1, p. 234.

remained incomplete until it had been confirmed by dotation.

Roman and Germanic dotations differed in another respect. Tacitus reports that among the *Germani* the wife gives the dowry to her husband, whereas among the Romans the husband gives it to his wife.<sup>52</sup> He describes how the relatives of the bride are present at the dotation to approve the gifts. The dowry might include oxen, a horse and bridle, a sword with shield, and a spear. The woman gives her husband some gift of arms in return. Tacitus is not a reliable source, and scholars have differed from one another as to what Tacitus is describing and as to how accurate his report may be.<sup>53</sup> Some have argued that what he described was the brideprice, given not to the bride herself but to her kin, and others that what he described was the morning gift. It is also possible that the report is essentially correct. Be this as it may, we should retain and underline Tacitus's central observation: that the principal gift came from the husband's side and not from the woman's, as was the case in Roman society. This difference is congruent with the difference in function, for whereas the Roman dowry was little more than an economic transaction (it contributed to the cost of the marriage and provided insurance for the wife), the Germanic dowry (whatever else it may have done) confirmed a contract. In some respects, at least, the transaction was like making a purchase.

By the early middle ages, the practice whereby men bestowed nuptial gifts upon their wives had become customary among Romans in at least some parts of the Latin world. Such a gift might take the form of a betrothal pledge (the *arrha sponsalicia*) or the counter-dowry that was given before the marriage took place (the *donatio ante nuptias*). Isidore of Seville says that the word *dotem* (the accusative form of *dos*, "dowry") is derived from "do item" ("I give again;" in other words, "I give in return"), since the man's *donatio* is the first nuptial gift and the woman's *dos* is the second. The reason for this pairing of gifts, he explains, is that in ancient times the partners purchased each other ("invicem emebant") lest the woman should seem to be the man's slave.<sup>54</sup> (The assimilation of marriage to purchase should be noted.)

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<sup>52</sup> Tacitus, *Germania* 18.1: "Dotem non uxor marito, sed uxori maritus offert."

<sup>53</sup> See Wemple, *Women in Frankish Society* (1981), p. 12.

<sup>54</sup> *Etym.* V.24.25–26: "Dictam autem dicunt donationem quasi doni

In Isidore, then, the man's *donatio* has become the principal gift and the woman's *dos* the counter-gift. Similarly, a law in the Visigothic code refers to what it says is the Roman practice of balancing the man's gift (here called *dos*) with a gift from the woman.<sup>55</sup> Among the Visigoths, the gift upon which the transaction of a formal marriage depended was the man's *dos* to the woman, while the woman's contribution was an optional counter-gift. Even in the Roman law of Burgundy, the principal gift is that of the man to the woman, and this may be denoted by the word *dos*. A passage in the *Lex Romana Burgundionum* even reverses the traditional terminology by calling the husband's gift the *dos* and what the wife contributes a *donatio*.<sup>56</sup> The reason for this is probably that the technical terms *dos* and *donatio nuptialis* have become synonymous, while the common word *donatio* can still denote any gift. When this code declares that marriage is not legitimate without *donatio nuptialis*, it is referring to the husband's gift.<sup>57</sup>

Among the Germanic peoples, the dowry was a condition and in some sense a payment for the handing over (the *traditio*) of a woman to her husband. The suitor would normally confer this payment or agree to do so at the betrothal, and his obligation was part of the contract. This might be called the essential gift, for there were other, optional gifts that were not necessary conditions for the transaction. Where Germanic laws use the word *dos*, it usually denotes an essential gift that the wife herself receives sooner or later, but where an essential gift is denoted by other words, it is not always clear to whom the payment ultimately went.<sup>58</sup> As well as her dowry,

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actionem, et dotem quasi do item. Praecedente enim in nuptiis donatione, does sequitur. Nam antiquus nuptiarum erat ritus quo se maritus et uxor invicem emebant, ne videretur uxor ancilla, sicut habemus in iure. Inde est quod praecedente donatione viri sequitur dos uxoris."

<sup>55</sup> *Lex Vis.* 3.1.5, p. 128: "iuxta quod et legibus Romanis recolimus fuisse decretum, tantum puella vel mulier de suis rebus sponso dare elegerit, quantum sibi ipsa dari poposcerit." The reference is probably to Valentinian, *Nov.* 35.9 (*Brev.*, Val. 12): "Pars vero feminae tantum dare debebit quantum sponsalibus maritus intulerit" (that is, the *dos* should equal the *sponsalicia largitas*). Cf. Majorian, *Nov.* 6.9 (not included in the *Breviary*): the wife should not give less as *dos* than she received as *sponsalicia largitas* (the converse of the position of *Lex Vis.* 3.1.5).

<sup>56</sup> *Lex Rom. Burg.* 21.3, p. 144 (on the woman who justly divorces her husband): "Quod si . . . maritum demittat, et conlatam in se donationem iure tuebitur, et dotem, quam ei maritus fecerit, vindicabit. . ."

<sup>57</sup> *Lex Rom. Burg.* 37.1-2, pp. 155-56. Cf. 16.1-2, p. 140.

<sup>58</sup> I use the word "dotation," in the context of Germanic marriage, to

the woman might receive a morning gift from her husband and a gift from her father or family. (At one time, she must have received the former on the morning after their wedding-night.) These gifts were not essential; that is, they did not constitute a formal condition for the *traditio*.

The precise purpose of the various gifts remains controvertible. They may all have been ways of passing on wealth from one generation to another. The functions and relative values of different kinds of gift may have reflected demographic trends such as the relative numbers of marriageable men and women. Scholarship in this field has until recently been dominated by the notion of brideprice: that is, the notion that under Germanic law the husband originally obtained his wife (or her *mundium*) from her kin in return for a payment (the brideprice or bridewealth) that compensated her kin for their loss. Since in the *leges* we often find that the essential gift goes directly or indirectly to the bride herself, some scholars have reasoned that the system of nuptial gifts evolved under the influence of the Roman *donatio nuptialis*. Again, scholars have attributed the supposed change to a degree of emancipation that gave women both wealth of their own and the legal capacity to marry (so that their consent became at least necessary and in some cases sufficient). The hypothesis of brideprice, once adopted, dictates both how one should interpret the laws and how one should understand their history.

François Ganshof has attempted to correlate the various forms of nuptial gift with the status and legal capacity of women.<sup>59</sup> In his view, comparisons between codes and between different laws in the same code can reveal successive phases in an evolution from the regime of bride-purchase to the regime of the *dos* (which the husband gave to his wife). In bride-purchase, Ganshof assumes, the bride was the object of the agreement and not a party to it. When in due course women acquired the right of consent and the legal capacity to contract marriage, the bride herself received her husband's gift.

Ganshof finds no trace of bride-purchase in the *Lex Alamannorum*, where the husband gives a dowry (*dos*) to his

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denote the transaction in which a gift is agreed to or given by or on behalf of the groom as a condition for the *traditio* of his bride, regardless of whether this goes to his wife or to her kin.

<sup>59</sup> "Le statut de la femme dans la monarchie franque," *Recueils Jean Bodin* 12 (1962), 5-58, esp. pp. 18-29.

wife. In the case of the *Lex Visigothorum*, where all the husband's gift goes to his wife as her *dos*, Ganshof finds a residual trace of bride-purchase in a law (3.1.6) that gives a girl's father the right to claim and conserve the *dos* given to her. (If her father and mother die, the heirs should not treat it as part of their inheritance but should rather restore it to the wife.) This analysis is convincing only if one assumes that a system of bride-purchase operated in the code's prehistory. Moreover, it is far from clear that (as Ganshof assumes) Visigothic law required the consent of an unmarried girl for her marriage.

The evidence of nuptial payments to the bride's *parentes* that Ganshof finds in the Burgundian and Saxon codes is more convincing. In the former, a gift called *wittimon* in the vulgar tongue (and *pretium nuptiale* in Latin) is said to be given for the girl ("pro puella"). Two thirds of this amount went to her family, while the bride herself seems to have kept the remainder.<sup>60</sup> When a widow remarried for the first time, the *wittimon* went to the nearest relative of her deceased husband, but a widow remarrying for the second time (that is, marrying her third husband) could keep the *wittimon* herself.<sup>61</sup> Ganshof points out that in the first case the widow is said to be given in marriage ("ad secundas nuptias traditur") while in the second she herself is said to take a husband ("tertium maritum accipere"). In the case of the widow Aunegilde, we are told that after the death of her *first* husband she had become betrothed to Fredegisil and had received the greater part of the "nuptial price" (*nuptiale pretium*).<sup>62</sup> We find that widows are said to be in possession (that is, to have the usufruct) of what is called both *donatio nuptialis* and *dos*.<sup>63</sup> This dowry may, as Ganshof suggests, be the portion of the *wittimon* that had passed to them. It seems that in Burgundian law, some of what the husband paid went to his bride's family and some went to the bride herself. What is not evident, but what Ganshof aims to show, is that these laws represent a modification of an earlier and more severe regime based on bride-purchase.

In Saxon law, a suitor was required to pay an amount known as the *pretium emptionis* ("purchase price") to his bride's *parentes*

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<sup>60</sup> *Lex Gund.* 66.1-3, pp. 94-95; 86.2, p. 108. See F. Beyerle, *Gesetze der Burgunden* (1936), p. 170.

<sup>61</sup> *Lex Gund.* 69.1-2, p. 95-96.

<sup>62</sup> *Lex Gund.* 85.3, p. 85.

<sup>63</sup> *Ibid.*, 24.1-2, pp. 61-62, and 62.2, p. 93.



or to her tutor (if she was a widow).<sup>64</sup> In the same code, however, we find that the husband gave a *dos* to his wife (probably in the form of a dower).<sup>65</sup> Ganshof sees in the Saxon *dos* a distinct gift introduced under the influence of Frankish law.

Diane Owen Hughes has argued that the regime of brideprice was replaced by that of donation from husband to wife, and that this in turn was replaced by the Roman-style dotation in the late eleventh century.<sup>66</sup> Hughes posits three categories of gift: brideprice, which the groom paid to his wife's kin in return for her *mundium*; the morning gift, which the groom paid to his bride on "the morning after the consummation of their marriage as the price of, or reward for, her virginity;" and the father's gift to the daughter when she married (the equivalent to the Roman dowry).<sup>67</sup>

The data do not fit comfortably into this scheme. Hughes is led to classify every nuptial gift from husband to wife as a morning gift, even when it is called *dos* or *donatio nuptialis* in the texts and even when it is conferred or pledged before the wedding. Notwithstanding this extended use of the term, she finds in the morning gift a "symbol of a new, medieval view of marriage" such that marriage "was based neither on the consent of the parties, as it had been in Rome, nor on the conveyal of rights through purchase, as it had been earlier among the Germans. Instead attention focused on the sexual act."<sup>68</sup>

This makes too much of the evidence. The term "morning gift" (that is, *morgingab* and its cognates) occurs rarely in most of the *leges*. In the laws of the Lombards, where the term occurs not infrequently, it denotes an optional additional gift made at the time of the marriage (rather than on the morning after consummation), and here the gift has no explicit connection with virginity or with sexual intercourse. Surprisingly

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<sup>64</sup> *Lex Saxonum* 40, p. 69: "Uxorem ducturus 300 solidos det parentibus eius. . . ." *Ibid.*, 49, p. 74: "Qui feminam ab alio desponsatam rapuerit, 300 solidos patri puellae, 300 sponso componat, et insuper 300 solidos *emat* eam. . . ." *Ibid.*, 43, p. 72: "Qui viduam ducere velit, offerat tutori *precium emptionis* eius. . . ."

<sup>65</sup> *Ibid.*, 47, pp. 73-74.

<sup>66</sup> From Brideprice to dowry in mediterranean Europe," *Journal of Family History* 3 (1978), 262-96.

<sup>67</sup> *Ibid.*, p. 266.

<sup>68</sup> *Ibid.*, p. 275.

perhaps, there is little indication in the *leges* that consummation is required for the formation of marriage, nor is it explicitly treated as significant (except in the case of abduction). Moreover, the rather rare morning gift is clearly different from the usual and essential dowry given by the husband. In the *Lex Ribvaria*, the widow whose husband has failed to leave her anything by written deed is entitled to 50 solidi as her *dos* together with one third of their common earnings *plus whatever he has given her as her morning gift*.<sup>69</sup> In a comparable series of laws in the *Lex Alamannorum*, the morning gift is valued at 12 solidi and the *dos* at 40 (or perhaps 400) solidi.<sup>70</sup> The *dos* here is in effect a dower (that is, wealth inherited by a widow from her husband), but under Ribvarian law the *dos* was conferred by written deed at the time of the betrothal.<sup>71</sup> Even if she did not come into possession of the gift until her husband died, the fact that it was denoted by the word *dos* suggests that this was simply another route whereby the husband could bestow the essential gift upon his wife. Since in any case her husband would have administered her property while he lived, it would have made little difference whether it became hers at once or not until she was a widow.

Some evidence that dotation was conditional upon the consummation of a marriage comes not from the *leges* but from Hincmar or Reims, who speaks of a certain woman keeping the dowry that she would have gained if sexual union had taken place.<sup>72</sup> The marriage in question was unconsummated, and in any case, Hincmar considered it to be invalid on the ground of prevenient affinity. The man had apparently already given the dowry to his spouse, for Hincmar suggests that she should keep it in compensation. Since the word *dotatio* usually denotes an agreement or contract, which might be prospective and conditional, it is often difficult to determine when the woman came into her property. Be this as it may, insofar as the dowry (*dos*) was conditional upon consummation, the ancient morning gift may have been its ancestor.

In recent years the notion of brideprice has fallen out of

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<sup>69</sup> *Lex Rib.* 41.2, p. 95.

<sup>70</sup> *Lex Alam.* 54.1–3, pp. 112–113.

<sup>71</sup> *Lex Rib.* 41.1, p. 95.

<sup>72</sup> *Epist.* 136, *MHG Epist.* 8, p. 98: "et ipsa puella post desponsalia dotem acceptam, quam de se ipsa, si carnaliter iungerentur, mercari debuerat, ut eandem dotem habere non debeat, non ipsa, sed Stephanus, ut videtur, commisit. . . ."

favour.<sup>73</sup> Jack Goody has argued that most gifts came sooner or later to the bride herself. Even though some gifts may have remained with the parents, he suggests, these constituted but one element in a complex system and were not survivals of a regime of bride-purchase. Goody is disposed to regard systems of nuptial gifts as patterns of inheritance, since what went to the wife passed on to her children in due course.<sup>74</sup>

Dotation served more than one function. First, whatever went to the woman herself might give her a degree of security and independence, although her rights regarding her dowry varied.<sup>75</sup> Among the Saxon *Westfali*, for example, a woman's *dos* went to her sons when her husband died.<sup>76</sup> Second, the dowry was one means of passing money from one generation to the next, for it would sooner or later be inherited by the woman's sons. Third, any payment that went to the bride's kin as bridewealth would have compensated them for their loss. Fourth, the essential gift might serve as a pledge comparable to the *arrha sponsalicia*, for under some codes a *sponsus* who failed to marry his *sponsa* was liable to pay it as composition.<sup>77</sup> Fifth, the essential gift, whatever it might be called and to whomever it went, ratified the contract of betrothal. As Robert Besnier has put it, dotation materialized the agreement of the parties.<sup>78</sup> The process of betrothal and dotation, as we shall see, was regarded as necessary for valid marriage in the Frankish Church, and thus as what distinguished marriage from concubinage.

The process of betrothal may be illustrated by the examples of Visigothic and Lombardic marriage, for it is about marriage among these peoples that we are best informed.

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<sup>73</sup> See, for example, K. F. Drew's expression of her change of mind in *Law and Society in Early Medieval Europe* (1988), "Comments and corrections," p. 3.

<sup>74</sup> Jack Goody, *The Development of the Family and Marriage in Europe* (1983), pp. 240 ff. Goody has subsequently pursued the question of brideprice in pre-industrial Eurasian societies at length in *The Oriental, the Ancient and the Primitive* (1990).

<sup>75</sup> See Hughes, "From Brideprice to dowry," pp. 270-72.

<sup>76</sup> *Lex Saxonum* 47, pp. 73-74: "Apud Westfalos: postquam mulier filios genuerit, dotem amittat; si autem non genuerit, ad dies suos dotem possideat, post decessum eius dos ad dantem vel, si deest, ad proximos heredes eius revertatur." I presume that under this regime, the *dos* passed to or through the wife when her husband died: cf. *Lex Rib.* 41.2, p. 95, and *Lex Alam.* 54.1-3, pp. 112-113.

<sup>77</sup> *Lex Salica* E 96, *MGH Leges* I, vol. 4.2, p. 169; Rothair 178, pp. 41-42.

<sup>78</sup> "Le mariage in Normandie," *Normannia* 7 (1934), p. 73.

*Visigothic marriage*

In the normal course of events, the process of getting married began when the suitor made his petition. This is evident from a law by Leovigild that abrogates a previous ban on miscegenation, arguing that persons who are equal in rank should not be separated when it comes to marriage. In future, a man of either race can take a woman of the other race as his wife, but certain conditions should be satisfied if the marriage is to be regarded as a valid and honourable union (*honesta coniunctio*), namely: there should be a formal petition (*petitio dignissima*); both parties should be free; there should be due consultation with the woman's family; and whoever has *potestas de coniunctione* over the woman must have agreed to the match.<sup>79</sup> Formal petition also crops up in a Visigothic dotal charter,<sup>80</sup> but we have no evidence as to what form it took.

The code determines who had *potestas de coniunctione* (that is, the right to refuse or accept the suitor and to give away the girl in marriage).<sup>81</sup> The power was vested primarily in the girl's father. If he died, it passed to her mother, and if the latter died or remarried it passed either to the girl's brothers or, if they were not of age, to the paternal uncles. In the case of an orphan girl, the decision as to whether or not to accept a suitor should be made by a family council consisting of the paternal uncles or brothers and other close relatives.

The rights of the woman herself are not clear. King argues that an unmarried woman who had reached the age of twenty was *sui iuris* and could choose her own husband, while a girl under this age could be betrothed against her will unless she was already a widow.<sup>82</sup> References to the need for a *girl's* consent to her marriage (rather than a woman's) are in the main conspicuous by their absence, although one law in the code prohibits a girl's brothers from giving their sister to a man whose inferior rank makes him unworthy of her or *whom she does not wish to marry*. If the brothers disobey this law they are considered guilty of complicity to an abduction; they lose half their property to their sister and receive 50 lashes in public.<sup>83</sup>

<sup>79</sup> *Lex Vis.* 3.1.1, pp. 121–22.

<sup>80</sup> *Vis.* 18, *MGH Form.* p. 582: "Nuptiarum solemnium festa petitio, quae fautore Deo semper simplici voto quaerenti conceditur, tunc magnum sui obtinet complementum, dum communium electione parentum perficitur."

<sup>81</sup> *Lex Vis.* 3.1.7, p. 130.

<sup>82</sup> *Law and Society* (1972), pp. 229–30.

<sup>83</sup> *Lex Vis.* 3.3.4, p. 141.

The girl's right of consent here may arise from the fact that her father is dead. (This law says nothing about the mother.) An orphan boy was free to choose a wife for himself once he reached adolescence (presumably at the age of fourteen).<sup>84</sup> This law perhaps implies that he would not have been so free while his parents were alive, but the code determines nothing in this regard. The very structure of the betrothal emphasized power over girls rather than over boys, for it was for the suitor to acquire the girl from her family.

The Visigothic code often refers to those who gave a girl in marriage and to whom suitors would apply simply as the *parentes*.<sup>85</sup> The word is difficult to translate, for its possible denotation ranges from parents (that is, father and mother)<sup>86</sup> to any more or less close consanguineous relatives. In the context of marriage, the word denotes those relatives who have *potestas de coniunctione* over the girl, whoever they may be. This usage is evident in some alterations by Ervig to an old law regarding the betrothed girl who runs off with another man against her father's will. Where the original text refers to any girl who has been betrothed with the agreement of her father, Ervig adds "or of other close relatives [*propinqui parentes*] to whom this kind of power has been bestowed by law." Later in the text, Ervig simply substitutes *parentes* for *pater*.<sup>87</sup> Perhaps the word *parentes* was useful because it denoted in an indeterminate way those who had power over the girl and to whom the suitor would make his petition. It would have been inconvenient to have had always to state precisely who held this power.

The betrothal was a contract between the *sponsus* on the one hand and either the *parentes* of the *sponsa* or the woman herself on the other. These parties normally entered into the contract in the presence of witnesses.<sup>88</sup> Dotation was an integral part of this procedure, and there could be no binding betrothal without it. Some laws in the Visigothic code indicate

<sup>84</sup> 3.1.7, p. 130.

<sup>85</sup> E.g. 3.2.8 (p. 138): "si absque cognitione et consensu parentum eadem puella sponte fuerit viro coniuncta, et eam parentes in gratia recipere noluerint. . . ."

<sup>86</sup> See for example 4.3.1 (p. 190): "ab utroque parente, hoc est patre vel matre;" *ibid.*: "parentes ipsorum, pater videlicet et mater."

<sup>87</sup> 3.1.2, pp. 122 (lines 15–17) and 123 (line 6).

<sup>88</sup> See 3.4.2, p. 147: "sicut consuetudo est, ante testes factum placitum de futuro coniugio fuerit definitum;" and 3.1.2, p. 124: "inter eos, qui disponandi sunt, sive inter eorum parentes aut fortasse propinquos pro filiorum nuptiis coram testibus precesserit definitio."

that the betrothal included an *agreement* regarding the dowry, while others indicate that the *gift* of a dowry was part of the betrothal. Thus one law determines that when a father has made a contract for his daughter's marriage and has agreed to a dowry, the betrothal remains binding if he dies before giving away his daughter.<sup>89</sup> Similarly, *parentes* who are guilty of complicity in the abduction of a betrothed daughter are required to pay to the *sponsus* four times the dowry that has been agreed.<sup>90</sup> An instance of the other pattern, in which the dowry is presumed to have been conferred, occurs in a law regarding the betrothed girl or woman who commits adultery or marries another man. If a dowry has been given and if the *sponsus* and the woman's *parentes* (or the woman herself, if she is *sui iuris*) have agreed to the future marriage before witnesses, as is customary, and if the *sponsa* then commits adultery, she is to be treated in the same way as the adulterer. Both should either be killed or given to the *sponsus*, and the dowry that the latter has given should be returned.<sup>91</sup>

This apparent inconsistency may be due in part to the fact that the agreement in question was often a written deed of gift. Examples of dotal charters are to be found among the *Formulae visigothicae*, although there is some doubt as to how many of these pertain to Gothic law.<sup>92</sup> Ervig's law prohibiting marriages without dowries (*Ne sine dote coniugium fiat*) presupposes that dowries involved written documentation.<sup>93</sup> The laws refer with apparent indifference to dowries being either given (*data*) or pledged in writing (*conscripta*). Giving and pledging may have at one time been two distinct kinds of transaction, but phrases such as *conferat vel conscribat* and *nec data nec*

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<sup>89</sup> 3.1.2, p. 123: "Eandem legem precimus custodiri, si pater de filie nuptiis definierit et de pretio convenerit, hac si ab hac vita transierit, antequam eam pater suus nuptui tradat. . . ." The *definitio* was the contract or stipulation whereby the parties agreed to marry. It may have included an agreement as to the date of the wedding: cf. 3.1.3 (p. 124): "nuptialium federum definitionem differant adimplere."

<sup>90</sup> 3.3.3, p. 141: "Si parentes raptori consenserint, pretium filie sue, quod cum piore sponso definisse noscuntur, in quadruplum eidem sponso cogatur exsolvere. . . ."

<sup>91</sup> 3.4.2, p. 147-48: "... dato pretio et, sicut consuetudo est, ante testes factum placitum de futuro coniugio fuerit definitum. . . ."

<sup>92</sup> *MGH Form.*, Vis. 14-20, pp. 581-85. Vis. 14 and 15 refer explicitly and 17 implicitly to Roman law.

<sup>93</sup> 3.1.9, pp. 131-32: "Nuptiarum opus in hoc dinoscitur habere dignitatis nobile decus, si dotalium scripturarum hoc evidens precesserit munus." Note also the phrase "dotalium tabularum . . . honestas" (p. 132).

*conscripta*, by which the *leges* refer to dotation, are probably instances of hendiadys.<sup>94</sup>

The suitor himself might confer the dowry, or someone else, usually his father, might confer it on his behalf.<sup>95</sup> When the dowry came from someone other than the suitor, the donor was a party to the agreement and might be regarded as having contracted the marriage for the *sponsus*.<sup>96</sup>

Under Visigothic law, the entire dowry (which might be called either *dos* or *pretium*) was a gift to the woman herself. If she was not of age, her father or whoever had *potestas de coniunctione* over her would take and conserve it on her behalf, but the woman would receive it eventually (probably when she reached the age of twenty).<sup>97</sup>

A law by Chindasvind determined that among commoners the dowry should not exceed one tenth of the man's estate.<sup>98</sup> Noblemen and *primates palatii* were permitted to give property up to the value of 1000 solidi and in addition ten slave-boys, ten slave-girls and twenty horses. (Ervig modified this law, making the standard maximum for nobles, as for commoners, one tenth of all the property the man owned or stood to inherit and adding ornaments to the value of 1000 solidi as an alternative to the slaves and horses.) No-one was to confer more than this unless the amount was matched by a counter-dowry from the woman's side, as was the custom (the text explains) under Roman law. If someone pledged an amount beyond these limits, the agreement had no force and could be revoked, and the *sponsus* (or, if he was unwilling, his kin) could then reclaim the excess.<sup>99</sup>

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<sup>94</sup> 3.1.5 (p. 127): "in puelle vel mulieris nomine dotis titulo conferat vel conscribat;" *ibid.* (addition by Ervig): "si contigerit, ut quicumque parentum pro filio suo in nurus sue nomine dotem conscribere debeat;" *ibid.*, rubric (p. 126): *De quantitate rerum conscribende dotis*; 3.1.9 (p. 132): "conscribendi dotem habet potestatem;" *ibid.*, rubric (p. 131): *Ut de quibuscumque rebus dos conscripta fuerit, firmitatem obtineat*; *ibid.* (Ervig's addition, p. 132): "Nam ubi dos nec data nec conscripta, quod testimonium esse poterit in coniugii dignitate futura. . . ."

<sup>95</sup> 3.1.5 (Ervig), p. 127: "Quod si contigerit, ut quicumque parentum pro filio suo in nurus sue nomine dotem conscribere debeat. . . ."

<sup>96</sup> Thus 3.1.9, pp. 131–32: "Cum quisque aut pro se aut pro filio vel etiam proximo suo coniunctionis appetit. . . conscribendi dotem habeat potestatem." This may explain why the agreement of the *parentes* on both sides is envisaged in 3.1.3 (p. 124): "inter eorum parentes aut fortasse propinquos pro filiorum nuptiis coram testibus precesserit definitio."

<sup>97</sup> 3.1.6, p. 130. On the interpretation of this law, see King, *Law and Society*, p. 244 (with n. 4).

<sup>98</sup> 3.1.5, pp. 129–30.

<sup>99</sup> *Ibid.*, pp. 126 ff.

The additional gifts permitted to nobles were a vestige of the ancient morning gift. A Visigothic dotal charter in verse that was composed before Chindasvind's time includes a grant of ten slave-boys, ten slave girls, ten horses, ten mules, and arms, adding that such was the ancient morning gift of the Goths.<sup>100</sup> It seems that by this time the morning gift, as a gift distinct from the dowry, was no longer in regular use.

The dotal charter provided a means whereby the betrothal was documented, but there was an alternative to this procedure: namely, the witnessed agreement might be ratified by the gift of a ring as a pledge (that is, as an *arrha*). In that case, documentation was not necessary and there might be no written evidence of the betrothal. The dowry would normally follow in due course. As in contracts of sale, the *arrha* had something of the function of a deposit or down-payment. Thus the law *De non revocandis datis arris*, which we have considered above, says that a betrothal is binding (unless dissolved by mutual consent) once the contract has been made before witnesses and a ring has been conferred as an *arrha*, even if there is nothing in writing.<sup>101</sup> Neither party can unilaterally dissolve the agreement, and therefore once the requirements regarding the dowry have been fulfilled in accordance with the relevant law (presumably a reference to the law limiting the amount of the dowry), the couple should proceed to celebrate their wedding.<sup>102</sup>

Isidore tells us that the ring was given by the *sponsus* to the *sponsa* as a sign of faith and as a token (*pignus*) that their hearts were joined together, and that it was placed on the fourth finger because a vein from there runs directly to the heart.<sup>103</sup> The practice of conferring a ring was not of Gothic but of Romano-Christian origin, being derived from the *subarrhatio cum anulo* of the Roman betrothal. The ring had taken on additional significance in the Church as a symbol of union and fidelity (the *anulus fidei*).<sup>104</sup>

<sup>100</sup> Vis. 20, *MGH Form.*, p. 584, lines 10–13.

<sup>101</sup> 3.1.3, p. 124.

<sup>102</sup> *Ibid.*: "Nec liceat uni parti suam inmutare aliquantenus voluntatem [sic], si pars altera prebere consensum noluerit; sed, secundum legem alteram [i.e. 3.1.5] constitutionem dotis inpleta, nuptiarum inter eos peragatur festa celebritas." See also 3.6.3, p. 170 (*Ne inter sponso discidium fiat*): "qui post arrarum traditionem, aut facta secundum leges definitionis sponsione, coniugale fedus contemnentis...."

<sup>103</sup> *De eccl. officiis* II.20.8, *CCL* 113, p. 92.

<sup>104</sup> On the *subarrhatio cum anulo*, see Anné, "La conclusion du mariage," *Ephemerides Theologicae Lovanienses* 12 (1935), pp. 527–28.



In due course, the *sponsus* and *sponsa* fulfilled the betrothal by coming together and living as man and wife. A nuptial ceremony of some kind seems to have been customary among the Visigoths,<sup>105</sup> but we do not know what form this took. One law refers to the clothes and ornaments lent to a girl for her wedding (“pro dignitate nuptialium federum”).<sup>106</sup> Isidore describes two kinds of nuptial veil. The first, called *mafors* in the vulgar tongue, was worn by the bride. The second, called *vitta*, was coloured red and white and was placed over the couple by the priest after he had blessed them to symbolize their union.<sup>107</sup>

Veiling and benediction were probably already customary in Spain in the fourth century, for they are mentioned in a letter from Pope Siricius to the Archbishop of Tarragona in AD 385.<sup>108</sup> The only mention of nuptial benediction in the *Lex Visigothorum*, however, occurs in a law by Ervig requiring baptized Jews to marry with dotation and the blessing of a priest.<sup>109</sup> The law seems to presuppose that there would be a formal wedding in any case, even without dotation and benediction, for it addresses those Jews who are going “to celebrate the nuptial festivity” (“nuptiale festum celebrare”), although it is possible that this is merely a pompous way of saying “to get married.” By the eleventh century, the Mozarabic liturgy included ceremonies both for the *arrha* and for the blessing of the bedchamber (*benedictio thalami*). In the former ceremony two rings, one from the *sponsus* and one from the *sponsa*, were blessed by a priest and then exchanged, after which the couple might kiss.<sup>110</sup> Practices of this kind may have gone on in the Visigothic era.

### *Lombardic marriage*

The Lombardic laws treat a man’s acquisition of a wife as a transference of a power or control known as *mundium* (the Latinized version of *munt* or *mund*). This conception is remarkably similar to that of the old Roman *manus*-marriage, and the word *munt* itself, like *manus*, means “hand.” It is this

<sup>105</sup> 3.1.3 (p. 124): “nuptiarum inter eos peragatur festa celebritas.”

<sup>106</sup> 4.5.3, p. 199.

<sup>107</sup> *De eccl. officiis* II.20.6–7, *CCL* 113, pp. 91–92.

<sup>108</sup> *Epist. ad Himerium*, *PL* 13:1136–37. The text also appears in *PL* 84:632 and *PL* 67:231. See Ritzer, *Le mariage* (1970), p. 231, n. 62 on these sources.

<sup>109</sup> 12.3.8, p. 436.

<sup>110</sup> See Ritzer, *Le mariage*, pp. 297–302 and 435–37.

formal version of the nuptial process that we shall consider here, although, as we shall see, the law permitted a woman to marry without parental consent and thus without the transference of *mundium*. Her partner in this less than entirely regular alliance was regarded as her husband (*maritus*),<sup>111</sup> but the legal standing of such marriages remains unclear.

As in Visigothic law, the normative pattern was that of the unmarried girl whose marriage involved her transference from her own family to that of her husband. The process began with a betrothal, whereby the *sponsus* contracted to marry the girl within a period determined by law. Dotation was essential to betrothal, and the agreement of the *sponsus* to confer a gift of specified value was part of the contract.<sup>112</sup> This gift, known as the *meta*, was in some sense the price of the girl's *mundium*.<sup>113</sup>

The agreement to a *meta* sealed the contract to marry. The man did not always confer this gift on the occasion of the betrothal, but he would at least promise to do so. Thus a law in Rothair's code regarding the *sponsus* who fails to marry his *sponsa* says that the former should fulfil that *meta* ("adinpleat metam illam") which he promised on the occasion of the betrothal. The *meta* is then said to have been exacted (*exacta*).<sup>114</sup> One may perhaps translate the word *adinpleat* here as "he should pay," but the underlying notion is that of fulfilling a promise. The word *meta* is almost always used in the context of the contract of betrothal, and only rarely is anyone said to have received or to possess the *meta*. We might define *meta*, therefore, as "what the *sponsus*, at the betrothal, agrees to confer as the condition for his acquisition of his bride's *mundium*." When the couple married, the *meta* became the girl's property as her *metfio*, and she might receive an additional amount from her husband as her morning gift.<sup>115</sup>

<sup>111</sup> See Liutprand 114, p. 154.

<sup>112</sup> Rothair 178, p. 41: "adinpleat metam illam, quae in diae sponsaliorum promisit;" Rothair 179, p. 42: "dubla meta, quantum dictum est in diae illa, quando fabola firmata fuerat;" etc.

<sup>113</sup> Thus Liutprand 114, p. 154: "Si puella sine voluntate parentum absconse ad maritum ambolaverit, et ei meta nec data nec promissa fuerit. . . ." Cf. Rothair 199, p. 49. in reference to the widow who has been liberated by her kinsfolk from her husband's family: "quantum pro mundium pater aut frater liberandum ad parentes mariti defuncti dedit."

<sup>114</sup> Rothair 178, p. 41.

<sup>115</sup> Lombardic laws denote this gift by several variant forms, for example *morgincap* and *morgenegab*. The amount fixed as *meta* is sometimes subsumed under the morning gift.

The fulfilment of the marriage consisted in the *traditio*, which in Lombardic terms was the transference of the *mundium* from the girl's *mundwald* (normally her father or brother) to her husband.<sup>116</sup> The girl would then normally receive, in addition to her husband's contribution, a contribution from her father or kin that was called her *faderfio*.<sup>117</sup> The *faderfio* was in effect her share in her family's inheritance, for once she had received it she could make no further claim on her family.<sup>118</sup>

According to Liutprand's laws, a girl should have reached the age of twelve before she can become either betrothed or married. Any man who becomes betrothed or married to a girl younger than this is guilty of the very serious crime of abduction. Curiously enough, a girl's father or brother may nevertheless betroth her or give her in marriage to whomever they wish and at any age (Li. 112). Similarly, while Liutprand severely criticizes and prohibits the practice whereby girls who have reached maturity marry boys who are beneath the age of twelve, he makes an exception for cases in which the marriage has been arranged between the boy's father or grandfather and the girl's *parentes* (Li. 129).

It seems that when a girl's *mundwald* was her father or brother, he could give her away in marriage without her consent.<sup>119</sup> A widow could not be married against her will, although she could not marry without her *mundwald*'s consent (Ro. 182, Li. 120).

We are not told the rules determining who normally had the girl's *mundium*, but it seems that the power was vested in the girl's father while he lived and then in one of her brothers if the father died. Lombardic laws sometimes refer to the holder

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<sup>116</sup> The notion of *traditio* is especially prevalent in the Lombardic codes. See, for example, Rothair 183 (p. 43) entitled *De traditione puellae aut mulieris*, which includes the following expressions: "ei tradatur ad uxorem;" "per mano simili modo [vidua] retradatur sicut priori marito tradita fuit;" "aliter sine traditione." The wedding-day is called *dies traditionis nuptiarum* in Rothair 181 (p. 42).

<sup>117</sup> Rothair 182, p. 43: "et quod de parentes adduxit, id est faderfio."

<sup>118</sup> See Rothair 181, p. 42, and Liutprand 3, p. 108. It is very difficult to determine exactly what the *meta*, the morning gift and the *metfio* in Lombardic law were and how they were related, and the meaning of these terms is probably not entirely consistent.

<sup>119</sup> Liutprand 119, p. 156: "Si quis filiam suam aut sororem sponsare voluerit, habeat potestatem cui voluerit, libero tamen hominem. . . ." Li. 12, p. 112: "Pater autem aut frater potestatem habeant, cui aut in qualitate voluerit, dandum aut spunsandum filiam aut sororem suam. . . ."

of the *mundium* as the *mundwald* (*mun-doald*),<sup>120</sup> but more usually denote the *mundwald* by a phrase such as "her father or brother or whoever holds her *mundium*."<sup>121</sup> A woman who had been abducted was allowed to choose to whom her *mundium* should belong, whether it might be to her father (if he was alive), to a brother, to a paternal uncle or even to the king. She could take with her whatever property she might have (Ro. 186).

The contract of betrothal, as we have noted, included the promise of the *sponsus* to confer a *meta*. As under Visigothic law, however, the betrothal could also be confirmed by the gift of a ring as *arrha*. This fact comes to light unexpectedly in a law by Liutprand against marriage to women who have taken the veil or become oblates but who have not yet been consecrated (Li. 30). The law says that if, as some maintain, any man who takes a woman as his wife after she has become bound to another by *subharratio* with a ring must pay 600 solidi in compensation,<sup>122</sup> how much more is that girl bound to her calling who has taken the veil?

Once a *sponsus* had entered into a contract of betrothal ("post sponsalias factas et fabola firmata"), he was to marry the girl within two years. If he refused to do so or failed to marry within this period without the excuse that some necessity prevented him, the girl's *mundwald* could appoint an advocate or surety (*fideiussor*) to exact from the *sponsus* the *meta* to which he had agreed, and this became the property of the girl herself (Ro. 178). If the *sponsa* died before the *traditio*, however, anything that the suitor had already given her as *meta* was to be returned (Ro. 215). If the *sponsa* was found to have had sex with another man, the *sponsus* was released from the contract and the woman could be punished as an adulteress.<sup>123</sup> The girl's *parentes* had the right to try to clear her name by compurgation with twelve oath-takers. If they succeeded in this, the *sponsus* remained bound by the agreement and would have to pay twice the agreed *meta* if he failed to marry her (Ro. 179). The *sponsus* was not bound by the contract if the *sponsa* became leprous, blind in both eyes or possessed (Ro. 180).

<sup>120</sup> E.g. Liutprand 12 and 100; Ahi. 15.

<sup>121</sup> E.g. Rothair 178 (p. 41): "pater aut frater, vel qui mundium eius potestatem habet." Cf. Rothair 200 (p. 49): "parentibus, qui eam ad maritum dederunt."

<sup>122</sup> Liutprand 30, p. 122. The law to which this refers is not extant, but cf. Rothair 190–91.

<sup>123</sup> That is, she could be put to death: see Rothair 211–12.

If another man married the *sponsa* with her consent, the former had to pay compensation both to her *parentes* and to the *sponsus*. The latter was to receive twice the agreed *meta* (Ro. 190). Similarly, if her mundwald gave her in marriage to another man, whether or not she consented, he had to pay twice the agreed *meta* to the *sponsus* (Ro. 192). Liutprand supplemented these laws by adding that in each case the guilty party had to pay in addition the equivalent of his wergeld to the king (Li. 119).

The *traditio* seems to have normally involved a formal wedding of some kind.<sup>124</sup> The Lombardic codes have almost nothing to say about the form of the nuptials, although bridesmaids (*paranymphae*) are mentioned incidentally (Ahi. 15). At the time of the wedding (as I have said), the woman received whatever had been promised as *meta*, which became her *metfio*. Her husband could increase his contribution by giving her a morning gift (Li. 7 and 103, Ahi. 14). At the same time, she received her share of the family inheritance from her father (or from her brother, if her father had died) as her *faderfio* (Ro. 181).

If the woman's husband died, her *mundium* remained with her affines but she was free to marry again. If she did so, her new husband had to pay to the nearest heir of her late husband half the *meta* that been agreed at the original betrothal. (This nearest heir, who might be her son, was presumably her mundwald.) If her mundwald refused to accept the suitor she had chosen, she retained her *faderfio* and her morning gift<sup>125</sup> and returned with her *mundium* to her own family. Her *parentes* could then give her in marriage, but only with her consent (Ro. 182). A widow's *parentes* could also release her by paying something (presumably half the original *meta*) to her affines for her *mundium* (Ro. 199 and 183).<sup>126</sup> She had the automatic right to return to her *parentes* if she was cruelly treated (Ro. 182). Rothair's code does not define what kind of maltreatment justified her return, but the definition was later supplied by Liutprand, according to whom sufficient maltreatment was constituted by failing to supply proper food and clothing,

<sup>124</sup> Cf. Rothair 181 (p. 42): "in diae traditionis nuptiarum;" Liutprand 103 (p. 150): "in diem votorum [i.e. nuptiarum]."

<sup>125</sup> Here the *metfio* is subsumed under the morning gift.

<sup>126</sup> It is likely that a widow had the automatic right to return to her *parentes* if her affines rejected her suitor, and that in this case nothing need be paid for the *mundium*.

excessive or unjustified beating, trying to marry the woman to a slave or freedman, or forcing her to marry even a freeman against her will (Li. 120). If a widow in a situation such as this had no legitimate *parentes* to whom she might return, her *mundium* might pass instead to the king, who would then act as her guardian (Ro. 182 and 183).

If a woman's mundwald caused her to commit adultery, and if the mundwald was neither her father or brother, he lost her *mundium*. The woman was then free either to return with her *mundium* to own family or to entrust herself to the royal court (Ro. 196). This law might have applied both to married women and to widows.

As we have noted, a widow might return to her own family if something was paid to her late husband's kin for her *mundium*. This payment normally came from her father or from one of her brothers (who, I assume, became her mundwald). If the father or brother subsequently died and the woman had not remarried, she retained her morning gift and *metfio*, but she shared her *faderfio* with her sisters in the following way: each of her sisters would first receive the same amount as was paid for her *mundium*; the remainder of the property was then shared equally by all of them (Ro. 199).<sup>127</sup> If a man killed his wife without just cause, her husband's gifts and her *faderfio* went to her sons, if she had any, or otherwise to the *parentes* who had given her in marriage (Ro. 200).

A widow was entitled under Liutprand's laws to bequeath up to one third of her property "for her soul" (that is, to the Church) or to whomever she chose, but the remaining two thirds remained in the power of her mundwald. If she had legitimate sons, it was they who held her *mundium*. A widow in this situation who entered a monastery could take one third of her property with her and leave it to the monastery. If she had no legitimate sons she could take as much as a half of her property to the monastery (Li. 101).

Lombardic marriage appears in the codes as a complex system involving the exchange of *mundium* and of associated pay-

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<sup>127</sup> A analogous method is applied to the case of brothers living together after their father had died in Rothair 167. If one of them marries and the inheritance is later divided up, each of the brothers takes an amount equal to the *meta* given by the married brother (which was taken from the common pool) and the remainder of the paternal and maternal property is then shared equally among all the brothers.

ments. In this respect it was markedly different from the free marriage of Roman law.

### *Divorce*

Most of the Germanic codes contain remarkably little on the subject of the dissolution of marriage. This fact may be due to the ease with which persons (especially men) could dissolve their marriages. Chindasvind's law in the Visigothic code determining the grounds for which each partner may divorce the other is headed *Ne inter coniuges divortium fiat* ("Let there be no divorce between married persons").<sup>128</sup> This rubric and the preamble that follows it suggest that the law was intended to limit rather than to facilitate divorce.

Chindasvind's rules are influenced by Roman law, but they are more strict. Whereas the Christian emperors allowed several grounds for divorce, adultery is the only cause for which Chindasvind permits a man to divorce his wife, and this must be proved in a public hearing before a judge. If any man repudiates his wife without good cause and marries another, he should be publicly flogged, his head should be shaved,<sup>129</sup> and he should be condemned to perpetual exile or imprisonment. The second wife, if she knew the man was already married, is to be handed over to the first wife, who may do with her what she wills, save only that her life should be spared. (A wife has the same right over her husband's lover if he is unfaithful.<sup>130</sup>) A couple may separate so as to follow the religious life, but only if a priest ascertains that this has been mutually agreed, and then neither may remarry.<sup>131</sup> Any wife who repudiates her husband and marries another should be returned to her rightful husband. If her husband becomes enslaved or is taken captive, she should remain chaste unless he is known to have died.<sup>132</sup> Only if her husband either commits homosexual acts<sup>133</sup> or causes

<sup>128</sup> 3.6.2, pp. 167–69.

<sup>129</sup> *Ibid.*, p. 168: "ac turpiter decalvatione fedatus." It seems more likely that he is shaved than scalped!

<sup>130</sup> 3.4.9, pp. 150–51.

<sup>131</sup> 3.6.2, p. 167: "Certe si conversionis ad Deum voluntas extiterit, communen adsensum viri scilicet et mulieris sacerdos evidenter agnoscat, ut nullam postmodum cuilibet eorum ad coniugalem aliam copulam revertendi excusatio intercedat." It is not clear whether both are supposed to convert or only one of them.

<sup>132</sup> See also 3.2.6, p. 137.

<sup>133</sup> See also 3.5.7, p. 165.

her to commit adultery against her will is she permitted to divorce him and remarry.

The Germanic codes do not explicitly permit divorce by mutual consent, which was usually freely available under Roman law.<sup>134</sup> P. D. King argues that Visigothic law must have permitted it because the *Lex Visigothorum* permitted a betrothal to be dissolved by mutual consent, and a betrothal had much the same legal force as marriage.<sup>135</sup> This argument is tenuous. There are Frankish formulae for the mutual agreement to end a marriage, but these do not pertain explicitly to Germanic law.<sup>136</sup>

It is unlikely that a wife in any formal Germanic marriage would have found it easy to divorce her husband. The *Lex Romana Burgundionum*, following the Theodosian code, provides reasons for which a woman may divorce her husband as well as reasons for which a man may divorce his wife: that is, he may divorce her for being an adulteress, a poisoner or a procuress (*adultera, venefica, conciliatrix*), while she may divorce him for being a murderer, a poisoner or a violator of sepulchres (*homicida, veneficus, sepulchrorum violator*).<sup>137</sup> The *Lex Gundobada* allows a husband to divorce his wife for adultery, witchcraft and the violation of sepulchres (*adulterium, maleficium, violatrix sepulchrorum*), grounds that evidently come from Roman law.<sup>138</sup> If he dismisses his wife without grounds, he is required to pay compensation to her. Regarding the woman who divorces her husband, the code says only that she is to be drowned in a bog.<sup>139</sup> This law must have been intended to discourage Burgundian women from following the example of their more liberated Roman compatriots.

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<sup>134</sup> Cf. *Lex Rom. Burg.* 21.1, p. 143.

<sup>135</sup> *Law and Society*, p. 235, n. 6. *Lex Vis.* 3.1.3, p. 124.

<sup>136</sup> *Tur.* 19, pp. 145–46; *Marc.* II.30, p. 94; *Merk.* 18, p. 248; *And.* 57, p. 24.

<sup>137</sup> *Lex Rom. Burg.* 21.2–3, p. 143–44. Cf. *Cod. Theod.* 3.16.1 (Constantine, AD 331) and also *CJ* 5.17.8.1–3 (Theodosius and Valentinian, AD 449).

<sup>138</sup> According to Constantine, a woman can divorce her husband for being a murderer, a medicine man, or a violator of sepulchres, while a man can divorce his wife for being an adulteress, a medicine woman or a procuress. The *Lex Romana Burgundionum* follows this. The Germanic code apparently conflates the two sets of crimes by ruling that a *man* may divorce his *wife* for violating sepulchres.

<sup>139</sup> *Lex Gund.* 34, p. 68.



## CHAPTER FOUR

### GERMANIC LAW: IRREGULAR AND INFORMAL MARRIAGE

#### *Abduction and elopement*

Germanic law and the Theodosian code treat abduction<sup>1</sup> and elopement differently in two important respects.

First, Germanic law permitted the abductor to settle the matter by coming to an agreement with the woman and her family. Abduction was a serious crime, and the laws treat it as a grievous injury against both the woman concerned and her family, but a man who was guilty of either abduction or violation might evade punishment by paying composition.<sup>2</sup> Moreover, some of the Germanic codes permitted the abductor to make the alliance legitimate by obtaining the agreement of the woman's *parentes* and paying something as composition or as dowry or as both. Where a system of the transfer of *mundium* operated, as under Lombardic law, the abductor could thereby become the woman's *mundwald*.<sup>3</sup> The Theodosian code strictly prohibited such agreements. Not only the abductor, but all those guilty of complicity in an abduction were to be severely punished, including the woman's parents. Therefore the woman's parents deserved to be severely punished if they came to an arrangement with the abductor and allowed him to keep the woman.<sup>4</sup>

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<sup>1</sup> It should be noted that *raptus* in both Roman and Germanic law usually denotes abduction rather than sexual intercourse with a woman against her will. Abduction is called *raptus* regardless of whether or not it has been consummated.

<sup>2</sup> See for example *Lex Gund.* 12.1–2, p. 51, and *Lex Baiuvariorum* 8.3–7, pp. 355–57. On violation and rape (i.e. not abduction [*raptus*] but violent sexual intercourse), see *Lex Frisionum* 9.1, p. 664; *Lex Alamannorum* 56, pp. 115–16. Cf. *Lex Romana Burgundionum* 19.1, p. 142, which states that a rapist should be put to death.

<sup>3</sup> *Lex Vis.* 3.3.7, p. 142 (but see also 3.3.1 with note 1, p. 140); Rothair 186–87, pp. 44–45; Rothair 190–91, pp. 45–46 (where another man's *sponsa* is abducted); *Lex Saxonum* 49, p. 74 (but cf. 40, pp. 69–70); *Lex Alam.* 50.1, p. 109 (where the woman is married) and 51, p. 110 (where a *sponsa* is abducted); *Capitula legibus addenda* (from the Capitularies of Louis the Pious, AD 818 or 819), cap. 9, *MGH Capit.* 1, p. 282.

<sup>4</sup> *Cod. Theod.* 9.24 (*Brev.* 9.19). The section consists of a constitution by Constantine with supplemental rulings by Constantius and Valentinian. See also *Lex Romana Burgundionum* 9.1–2, p. 132, which adopts the same position.

The second difference is this. According to the Theodosian code, a man who took a maiden as his wife without the consent of her parents was an abductor *even if the woman herself consented*. Her consent did not mitigate his crime but rather made her a partner in it, and thus liable to the same punishment. The willingness of the girl was a matter of degree. If she consented outright, she was as guilty as the abductor. But even if she was unwilling, there might have been some degree of complicity or responsibility on her part. If she was abducted while she was out of doors, she was guilty at least insofar as she should have remained safe indoors until her marriage. And even if the abductor broke into her house, she perhaps did not do enough to defend herself, or did not cry out to summon help from her neighbours. In such cases, the girl would not receive the full penalty, but she was to be punished by being disinherited.<sup>5</sup> Abduction under Roman law was what scholars call *raptus in parentes*: that is, the taking of a woman who is *alieni iuris* without the agreement of her father or family. It follows that the law made no distinction between abduction and elopement.

Under Germanic law, on the contrary, the woman's consent mitigated the man's crime to a greater or lesser degree. Moreover the laws clearly distinguish abduction (where the girl was unwilling) from elopement (where the girl herself chose to run off with a man without the consent of her *parentes*). Those who compiled the codes considered the two cases to be related. They usually treated elopement alongside abduction, and they sometimes treated it under the heading of abduction.<sup>6</sup> Nevertheless, the laws did not treat elopement as a form of abduction, and where there were penalties, these were usually much lighter.<sup>7</sup> The laws on elopement varied considerably, but in general the codes were tolerant. They recognized that a marriage might be founded on the mutual agreement of the spouses instead of on an agreement between the suitor and the woman's *parentes*. Those who got married in this way were usually required to pay compensation. In certain circumstances, according to some of the codes, the girl might suffer disinheritance.<sup>8</sup>

<sup>5</sup> *Cod. Theod.* 9.24.1.

<sup>6</sup> See for example *Lex Gundobada* 12.4–5 (pp. 51–52), where elopement is treated under the heading *De raptibus puellarum*.

<sup>7</sup> Cf. *Lex Thur.* 46 and 47, pp. 135–36; *Lex Gundobada* 12.1–3 and 12.4–5, pp. 51–52 (see also 101, p. 114); Rothair 186–87 and 188, pp. 44–45; *Lex Saxonum* 40, pp. 69–70 (see also 49, p. 74).

<sup>8</sup> The penalty of disinheritance is applied in *Lex Gundobada* 12.5, p. 52

Three features of the laws on elopement in the Germanic codes are particularly striking. First, it is always the woman who is said to have acted without parental consent. Second, the laws often emphasize the active and wilful nature of what the woman does. The laws say that she has run off with the man, or acted of her own accord, or acquired a husband or married a man for herself.<sup>9</sup> Part of the reason for this is probably to distinguish such cases from abduction, but the emphasis indicates the extraordinary nature of such marriages, for in the normal course of events the suitor took the active role: he petitioned for the girl, acquired her from her *parentes* and took her as his wife. Third, the laws treat the alliance as marriage: the couple are husband and wife, and are sometimes said to have married or to have become joined in marriage even before the relationship is regularized. In this way, the *leges* clearly distinguish elopement from mere fornication.<sup>10</sup>

An *antiqua* or "ancient law" in the Visigothic code envisages two distinct situations, in both of which a woman has run off with a man without the agreement of her *parentes*. In the first situation, the husband negotiates with the *parentes* before marrying the woman, while in the second the couple are married without the knowledge of the *parentes*, who are therefore presented with a *fait accompli*. The law says first that if a free girl goes off with a freeman on the understanding that he should be her husband but before he has consulted her *parentes*, and if he is then able to arrange that she should be his wife (that is, by obtaining the consent of her *parentes*), then he should pay the appropriate dowry to her *parentes* in accordance with the law. Second, if he is unable to arrange this, the girl should remain in the power of her *parentes* (she remains *in parentum potestatem*). Third, if the same girl of her own free will has married the man without the knowledge and consent of her *parentes*, and if they are not willing to comply with the match, then the woman does not have the right to inherit along with her siblings because she has gone to her husband without her *parentes*' permission. If her *parentes* wish to give her something

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(in the case of a Roman girl eloping with a Burgundian man); Liutprand 119, p. 157 (in the case of a *sponsa*); *Lex Visigothorum* 3.2.8, p. 138; and *Lex Thuringorum* 47, pp. 135–36.

<sup>9</sup> Cf. *Lex Vis.* 3.2.8; Rothair 188; *Lex Gund.* 12.4–5 and 100; *Lex Thuringorum* 47.

<sup>10</sup> Cf. *Lex Vis.* 3.4.7, p. 150 (on fornication), and 3.2.8, p. 138 (on elopement); and similarly Rothair 189 and 188, p. 45.

from their property, however, they are free to do so, and she is free to do with this what she wishes.<sup>11</sup>

Scholars usually consider that the girl referred to in the second clause, who remains in the power of her *parentes*, has married without parental consent. In that case, she has either married without the transference of *mundium* (as the proponents of *Friedelehe* would argue) or at least, as Merêa has suggested, has not been fully emancipated from her father because she married without his consent.<sup>12</sup> But marriage without parental consent and its consequences are treated in the clause that follows. I take it the girl who remains in her *parentes'* power is prevented from marrying and returns to her family. If a marriage is contracted without the knowledge of the girl's *parentes*, however, so that they are presented with a *fait accompli*, the marriage should not be dissolved but the girl is disinherited. This is the situation envisaged next. In short, a girl could marry against the wishes of whoever had power over her, but by so doing she lost her right to inherit from her father.<sup>13</sup>

Wemple has stated that under the Bavarian code "a woman had the right to arrange her own union" but that "in such a quasi marriage (*quasi coniugium*) she did not have the same economic protection as in a formal matrimony contracted by her parents." "If the man changed his mind," Wemple explains, "she was entitled to claim only 12 solidi."<sup>14</sup> According to other laws under this, the eighth, title, the same indemnity of 12 solidi was due to the girl who had fornicated and whose lover refused to marry her, while a *sponsus* had to pay 24 solidi to his *sponsa* if he deserted her to marry another. A man who deserted his wife through no fault of hers, but simply because

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<sup>11</sup> *Lex Vis.* 3.2.8, p. 138: "Si puella ingenua ad quemlibet ingenuum venerit in ea condicione, ut eum sibi maritum adquirat, prius cum puella parentibus conloquatur; et si obtinuerit, ut eam uxorem habere possit, pretium dotis parentibus eius, ut iustum est, inpleatur. Si vero hoc non potuerit obtinere, puella in parentum potestate consistat. Quod si absque cognitione et consensu parentum eadem puella sponte fuerit viro coniuncta, et eam parentes in gratia recipere noluerint, mulier cum fratribus suis in facultate parentum non succedat, pro eo, quod sine voluntate parentum transierit praeior ad maritum. Nam de rebus suis si aliquid ei parentes donare voluerint, habeant potestatem. Ipsa quoque de donatis et profligatis rebus faciendi quod voluerit libertatem habebit."

<sup>12</sup> See P. Merêa, "Le mariage *sine consensu parentum*," in *Revue internationale des droits de l'antiquité* 5 (1950), = *Mélanges Fernand De Visscher* IV, pp. 214-15.

<sup>13</sup> On the penalty of disinheritance see also *Lex Vis.* 3.1.8, p. 131 and 3.4.7, p. 150.

<sup>14</sup> *Women in Frankish Society* (1981), p. 34.

he had grown tired of her, had to pay 48 solidi to her *parentes* and give the woman her dowry and whatever she had brought into the marriage from her family. Thus a man might pay 48 solidi for abandoning his wife, 24 for abandoning his *sponsa* and 12 for abandoning his lover. If Wemple's interpretation is correct, he also paid 12 solidi for abandoning his *Friedelfrau*. The scale of composition seems to suggest that the Bavarians did not consider a match made by the woman herself, without the formal agreement of her *parentes*, to be a true marriage at all but rather a kind of tolerated fornication. It is not clear that one should interpret the law in question in this way, however, or even that it refers to *Friedelehe* or elopement. Let us consider the text, for its meaning is uncertain.

The law simply says that a man who persuades a woman *quasi ad coniugem* and then dismisses her *in via*, a situation that the Bavarians call *wanclugi*, must pay twelve solidi in composition.<sup>15</sup> There is no reference to parental consent or to its absence. Clearly, the man has not abandoned his legitimate wife, for that is covered by another law and has more serious consequences, but there is no indication as to why the liaison falls short of marriage. Nor does the law speak in terms of quasi-marriage (*quasi coniugium*).<sup>16</sup> The phrase "suaserit quasi ad coniugem" may mean not that the man persuades her to live with him as if she were his wife but rather that he persuades to go with him on the understanding that she would become his wife. The situation would be much the same as that envisaged in the first part of *Lex Visigothorum* 3.2.8, where the woman runs off with a man intending to marry him, except that in this case the man has deceived and seduced the woman. The phrase "in via eam dimiserit" may mean not that he abandons his quasi-wife in due course but rather that he abandons her before fulfilling his promise to marry her or before finalizing the marriage. The word *wanclugi* probably denotes some kind of marital fraud, and the rubrics suggest that a deceitful promise is involved.<sup>17</sup> Thus the text may mean

<sup>15</sup> *Lex Bai.* 8.17, p. 361: "Si quis liberam feminam suaserit quasi ad coniugem et in via eam dimiserit, quod Baiuuarii uanclugi vocant, cum XII solidi componat."

<sup>16</sup> Wemple misquotes the text (p. 216, n. 42), giving *coniugium* instead of *coniugem*. This reading is found in some of the variants.

<sup>17</sup> See *Lex Bai.*, *MGH leges* 5.2, p. 361, n. 1, and the entry in the glossary on p. 488. For rubrics, see p. 226: "Si promissione feminam fraudaverit;" "Si de promissione fraudaverit;" "Si feminam aliquis ad curvum iugem suaserit."

that if someone persuades a woman to live with him on the understanding that she would be his wife, and then before finalizing the marriage abandons her, then he must pay 12 *solidi* in compensation. Be this as it may, we cannot draw from this law any safe conclusions regarding the standing of marriage without parental consent among the Bavarians.

The position of Lombard law, on the contrary, is evident. Rothair's code determines that when a woman runs off with a man of her own free will, accepting him as her husband, then the man must pay 20 *solidi* as composition and a further 20 in place of the vendetta. The man may then obtain her *mundium*. Unless the man paid composition (and perhaps also obtained the agreement of the *parentes*), he would not have the woman's *mundium*, but the couple were nonetheless regarded as husband and wife: he was her *maritus* and he is said to have taken her as his wife ("eam accepit uxorem"). If the woman dies before her *mundium* is transferred, however, her property reverts to her *mundwald* and her husband suffers no further penalty.<sup>18</sup> A law in Liutprand's code deals with the opposite case, in which the man has died. If a woman has taken a husband without the consent of her *parentes*, the law declares, and no *meta* has been given or promised, and if her husband dies before obtaining her *mundium*, then she has no right to claim anything as *meta* from his heirs.<sup>19</sup> Liutprand determines that an betrothed girl who elopes is to be disinherited and that her father or brother is prohibited from giving or leaving her anything.<sup>20</sup>

Much doubt remains about the precise status of these spontaneous marriages. The Lombardic and Alamannian codes provide for the transference of *mundium* after compensation has been paid. But if the alliance were not regularized in this way, would it have been regarded as fully legitimate matrimony? Would the children have been legitimate heirs? Would the partners have been subject to the same requirements regarding exclusivity, adultery and permanence? And when the parents had the legal right to receive composition, did the law allow the couple to remain married if the man could not meet this requirement? The evidence does not justify certainty in these matters.

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<sup>18</sup> Rothair 188, p. 45. Cf. *Lex Alam.* 53, p. 111, which likewise involves compensation and the transfer of *mundium*.

<sup>19</sup> Liutprand 114, p. 154.

<sup>20</sup> Liutprand 119, p. 157.

Scholars have usually considered the laws on elopement, like those on abduction, to be peculiarly and characteristically Germanic. According to one interpretation, the result of elopement was a form of *Friedelehe* in which the *mundium* did not pass from the *mundwald* to the husband. Paulo Merêa, however, has shown that the legislation may have originated in Roman vulgar law.<sup>21</sup> In Roman society, he points out, the principle of *patria potestas* gave way to a different rationale for parental interference during the fourth and fifth centuries. The consent of a widow might be required for her child's marriage, for example, while a woman who was *sui iuris*, and thus no longer strictly in the power of her father, might nevertheless need parental consent to get married. This dilution of principle seems to have led to a relaxation of paternal power over marriage and thus to have made way for the toleration of marriages without paternal or parental consent.<sup>22</sup> Moreover, there is some evidence that disinheritance became the customary penalty for a daughter who married in this way. One such piece of evidence is a rule by Constantine that we have noted above: girls who show a degree of complicity in their own abduction are to be disinherited.<sup>23</sup> Now disinheritance, as we have noted, is the penalty for a girl who marries without parental consent in the Visigothic code, and the *Lex Gundobada* says that this penalty applies when a Burgundian marries a Roman girl.<sup>24</sup>

Merêa's thesis, then, is as follows: first, that vulgar Roman law tolerated marriage without parental consent but regarded it as improper, so that the girl was punished by disinheritance; second, that this customary law attained written formulation not in Theodosian or Justinianic law but in the Germanic codes.

<sup>21</sup> "Le mariage 'sine consensu parentum' dans le droit romain vulgaire occidental," *Revue internationale des droits de l'antiquité* 5 (1950), = *Mélanges Fernand de Visscher* IV, 203-17.

<sup>22</sup> Cf. *Pauli sent.* II.20.2 (*Brev.*, ed. Haenel, p. 368): "Eorum, qui in potestate patris sunt, sine voluntate eius matrimonia iure non contrahuntur: sed contracta non solvuntur: contemplatione enim publicae utilitatis privatorum commoda praeferuntur. *Interpretatio.* Viventibus patribus inter filiosfamilias sine voluntate patrum matrimonia non legitime copuluntur: sed si coniuncta fuerint, non solvuntur; quia ad publicam utilitatem antiquitas pertinere decrevit, ut procreandorum liberorum causa coniunctio facta non debeat separari."

<sup>23</sup> *Cod. Theod.* 9.24.1.2.

<sup>24</sup> *Lex Gund.* 12.5, p. 52. Cf. *Lex Romana Burg.* 9.2, p. 132, which may imply that elopement was punished by disinheritance under Roman law in Burgundy.

The theory of three distinct and definitive ways to get married, *Kaufehe* (or *Muntehe*), *Raubehe* (marriage by capture) and *Friedelehe*, each with its distinct consequent status of being married, is misleading. The codes contain laws regarding the formation of marriage by the normal and regular means: that is, petition, dotation and betrothal. They also provide legislation for alliances formed irregularly and without these formalities: namely, when a man abducts an unmarried woman and when an unmarried woman elopes. While the codes tolerate alliances of the third kind and treat them, at least for some purposes, as marriage, they treat abduction as criminal and intolerable. Nevertheless, provisions are made whereby penalties or retribution for abduction, as for some other serious injuries in Germanic law, such as murder, can be obviated by composition. Moreover, alliances formed irregularly may be subsequently legitimized by *post factum* contract and dotation. There are some grounds for supposing that marriage after elopement had among some Germanic peoples a distinct status as an irregular or incompletely legitimate way of being married. The same cannot be said of marriage after abduction.

#### *Informal marriage*

The Germanic betrothal was formal contract. Normally the *parentes* of the girl would agree to hand her over in due course to the suitor, and the suitor conferred or promised to pay a dowry. The parties made this agreement before witnesses. Power over the girl passed from the *parentes* to the suitor. This norm might be adapted *mutatis mutandis* according to circumstance (as, for example, if the couple cohabited before the betrothal or where the law permitted a woman to become *sui iuris*). But was the betrothal (*desponsatio*) an essential part of getting married? It might be argued that marriage could be contracted without a witnessed agreement or without dotation. Some have even maintained that Germanic marriage was in essence a "social fact" (in other words, a condition existing *de facto* and not a bond created by an act of agreement).<sup>25</sup> If marriage was essentially informal or *de facto*, the transference of *mundium* in Lombardic law would not have been the essence of marriage but rather a distinct transaction that accompanied marriage.

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<sup>25</sup> See, for example, King, *Law and Society* (1972), pp. 223–24; Brundage, *Law, Sex and Christian Society* (1987), pp. 128 and 130; and Wemple, *Women in Frankish Society* (1981), p. 35.



The evidence for informal marriage is much more tenuous than scholars sometimes suppose. In the laws and records of abduction and on marriage without parental consent, we find that the woman in question is said to become an *uxor* and to be joined to the man in *coniugium* or *matrimonium*. The man is sometimes said to be her *maritus*. But the meaning of these words may be imprecise. What we need to know here, and will have difficulty finding out, is the precise legal standing both of the relationship in question and of its issue.

Whether children were legitimate was not so clear-cut as it was under Roman law. Under Lombardic law, the children of an alliance that was neither proscribed by some impediment (such as proximity of relationship) nor formally contracted were placed in a middle category, being neither illegitimate nor legitimate but “natural.” Natural children, unlike illegitimate ones, could inherit, but the lion’s share went to the legitimate children.<sup>26</sup> A similar secondary right of illegitimate children to inherit appears in a Visigothic law that prohibits men from marrying consecrated virgins and widows and from marrying women to whom they are closely related by blood. The law says that persons who have married in this way are to be separated and that the marriages in question are false.<sup>27</sup> (In other words, such marriages were annulled.) Nevertheless, any children of the union may inherit as long as there are no legitimate children with a prior claim and as long as they have been baptized, since their baptism expiates the uncleanness of the union.<sup>28</sup>

Merovingian alliances such as that between Theudebert and Deoteria or that between Chilperic and Fredegund have been cited as examples of informal marriage.<sup>29</sup> All the chronicles tell us, however, is that the couples in question got married; that they did so without formality is mere supposition. Thus Gregory of Tours tells us simply that Theudebert “associated her to himself in marriage” (“eamque sibi in matrimonio sociavit”).<sup>30</sup>

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<sup>26</sup> See K. F. Drew, *Notes on the Lombard Institutions*, in *Law and Society* (1988), pp. 66–67.

<sup>27</sup> *Lex Vis.* 3.5.2, p. 160: “. . . non licito conubio aut vim [sic] aut consensu accipiat coniugem [huiusmodi]; quia nec verum poterit esse coniugium, quod a meliori proposito deducitur ad deterius, et sub falsi nominis copula incestiva pollutio et fornicationis inmunditia perpetratur.”

<sup>28</sup> *Ibid.*, pp. 160–61: “. . . sunt tamen unda sacri baptismatis expiati.”

<sup>29</sup> See Wemple, *Women in Frankish Society* (1981), p. 37.

<sup>30</sup> *Historia Francorum* III.23, *MGH Script. Rer. Mer.* I.1, p. 131.

Gregory's account of Fredegund's marriage to Chilperic is more interesting.<sup>31</sup> Chilperic had married Galswinth, daughter of the Visigothic king Athanagild, with due formality: he petitioned for her from her father, who gave her along with a considerable fortune. Chilperic, Gregory tells us, received her with great honour and they got married ("eiusque est sociata coniugio"). Galswinth received five cities as her dowry and morning gift.<sup>32</sup> Now, in seeking to obtain the hand of Galswinth, Chilperic had promised to give up his many *uxorae*. This could mean that he was polygamous, but the word *uxor* need not imply legitimacy. His *uxorae* may have been concubines. Among these *uxorae*, it seems, was Fredegund. Chilperic fell out with Galswinth because he still loved (or was conducting a sexual relationship with) Fredegund, "whom he had had before." Galswinth was strangled. Perhaps Chilperic had arranged this. Gregory then simply records that after a few days Chilperic married Fredegund: "Rex autem . . . post paucos dies Fredegundem recepit in matrimonio." This may mean that Chilperic formally married a woman who had previously only been his mistress. Be this as it may, there is no reason to suppose that the marriage was informal.

Robert Besnier has argued that an informal alternative existed among the Vikings and survived as marriage *more danico* during the early years of the Duchy of Normandy.<sup>33</sup> He considers the marriages entered into by the first three Dukes of Normandy: Rollo, William Longspear and Richard I. The Normans were Vikings, and their territory at the mouth of the Seine became the Duchy of Normandy under Rollo in 912. During the tenth century, therefore, the Normans were in the process of assimilating the law and custom that had been shaped by the Carolingian Franks. Besnier's source of evidence for these marriages is the chronicle by William of Jumièges, written in the second half of the eleventh century.

Rollo took Poppa as a captive during a raid on Bayeux and shortly afterwards married her in Viking fashion: "more danico sibi copulavit." (This was before the formation of the Duchy.) He later repudiated her and married another, this time in Christian fashion. His successor, William, was a child of the

<sup>31</sup> *Ibid.*, 4.28, pp. 163–64.

<sup>32</sup> *Hist. Franc.* IX.20, *MGH Script. Rer. Mer.* 1.1, p. 376.

<sup>33</sup> R. Besnier, "Le mariage en Normandie des origines au XIII<sup>e</sup> siècle," *Normannia* 7 (1934), 69–110 (esp. pp. 86 ff.).

first union. After his second wife's death, Rollo took back and formally married Poppa, perhaps with the intention of removing any doubts regarding William's right to succeed him. William followed his father's example: he married Sprota, the chronicler tells us, in Viking fashion (*more danico*).

These are the only explicit references to Viking-style marriage, and unfortunately the chronicler does not tell us what its peculiarities were. Besnier, however, suggests that an alliance between Richard and Gonnor, about which we are better informed, was also a Viking-style marriage.

Richard had married Emma formally: they were married some time after becoming betrothed, he gave a dowry, and her father gave her away. There is no record of any involvement of the Church. After Emma died, Richard entered into an informal alliance with Gonnor. It came about in this way. While staying with a *forestarius*, Richard demanded that the latter's wife should sleep with him. The *forestarius* and his wife tricked the Duke by substituting the wife's sister, Gonnor. Richard was well pleased with her. They had several children and she was regarded as his *comptissa*. But a problem arose when Richard wished Robert, his son by Gonnor, to become Archbishop of Rouen. Because his mother was not *desponsata*, the chronicler tells us, Robert was not eligible for preferment in the Church. Therefore Richard and Gonnor were married in Christian fashion (*more christiano*), and the children were legitimized at the same time by going under the *pallium* with their parents. According to Besnier, their marriage had hitherto been *more danico*.

Besnier argues that the Icelandic sagas provide evidence of an informal alternative to marriage by betrothal and dotation.<sup>34</sup> By living together a couple were regarded as married, as long as there was no objection from the woman's *parentes*. The couple's cohabitation implied their own mutual consent, while parental consent was necessary if the alliance was to be distinguished from *raptus in parentes*. Besnier suggests that marriage *more danico* was a survival of the old informal marriage, and that it was originally regarded as a legitimate form, although the offspring's rights of succession may have been "moins solides"

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<sup>34</sup> On the formal marriage of *Grágás*, a code of Icelandic law compiled in the twelfth and thirteenth centuries, see R. Frank, "Marriage in twelfth- and thirteenth-century Iceland," *Viator* 4 (1973), pp. 474-77; and J. M. Jochens, "The Church and sexuality in medieval Iceland," *Journal of Medieval History* 6 (1980), p. 380.

(p. 91). It was less binding than formal marriage (hence Rollo's repudiation of Poppa) but required the consent of the *parentes* (for Gonnor had been in effect given to Richard by her sister and brother-in-law). Besnier speculates that the assimilation of Frankish norms in Normandy would have ousted Viking-style marriage by reducing it to the status of mere concubinage.

Besnier's interpretation of the Norman chronicle is ingenious, but the evidence may be interpreted in other ways. First, Rollo had abducted Poppa before marrying her, and it is possible, therefore, that marriage *more danico* was the result of legitimizing an abduction. Since the Carolingian reformers were opposed to this peculiarly Germanic practice, it would not be surprising if William of Jumièges looked back on it as Viking-style marriage. Secondly, we do not know that Richard's former alliance with Gonnor was marriage *more danico* or even that anyone regarded it as a true marriage. In saying that Gonnor was not *desponsata*, William may have meant simply that she was not married. Thirdly, Richard's formal marriage to Gonnor was a Church wedding (hence the *pallium*), and it may be that this is precisely what the chronicler meant when he recorded that they married *more christiano*. It is possible, therefore, that marriage *more danico* was neither informal marriage nor even legitimized abduction but simply secular marriage contracted in accordance with Germanic law rather than ecclesiastical marriage.

The evidence of the *Lex Visigothorum*, it seems to me, suggests that among the Visigoths there could be marriage without dotation but that marriage was always a compact initiated by a definite act. At least by Ervig's time, the laws presupposed that becoming legally married involved some kind of formal ceremony.

Consider, for example, the Visigothic law on elopement that has been discussed above (*Lex Vis.* 3.2.8). I have suggested that the law envisages two situations, in both of which a girl has run off with a man without parental consent. In the first situation, he asks for her hand in marriage before marrying her, while in the second they get married before the girl's *parentes* have found out. If this interpretation is correct, the law presupposes that even without betrothal and dotation a couple can get married in some formal and definitive way that is distinct from merely beginning to cohabit.

Two other texts corroborate this thesis. One is a famous addition by Ervig to a law ruling that dotal agreements are

binding.<sup>35</sup> Ervig adds to the rubric the words *Ne sine dote coniugium fiat* ("Let there be no marriage without a dowry"). The verbal form implies a prohibition of marriage without a dowry, and not merely an exhortation that there should be a dowry. Nevertheless, Ervig does not declare that the marriage is invalid if there is no dowry, and the law presupposes that couples have in fact been getting married without dowries. The text following the rubric reveals that it is not the dowry itself that is important in Ervig's mind but rather the documentation that goes with it. A dowry would have been conferred by means of a charter, in accordance with the Roman practice. (Several Visigothic formulae for dotal charters have survived.) Therefore Ervig's text explains that marriage has dignity and honour insofar as it follows written dotation. Without this there will be nothing in years to come to testify to the dignity of the marriage, for there will be no public acknowledgement that the marriage has been celebrated (*celebrata*) nor evidence in the form of dotal documents.

A note to Zeumer's edition of the text refers us to the Emperor Majorian's novel of 458 (in which Majorian decreed that marriages without dowries were to be invalid) and also to Leo's letter to Rusticus.<sup>36</sup> But there is nothing in the wording or in the argument of the text to link it with either source. Nor is there any solid evidence from elsewhere that Majorian's novel, which is not in the *Breviary*, was known in the Latin West at this time. It may be noted that the argument is very similar to that of Justinian's novel of AD 538 (*Nov.* 74.4). Like Ervig, Justinian requires dotation because of the need for documentary evidence of the marriage.

The chief point to note here is that Ervig demands a written dowry as proof that the marriage has been *celebrated*. We do not know what form this celebration may have taken, but the word implies more than the mere inception of cohabitation. It is possible that a marriage could be contracted by a simple verbal agreement. Some texts in the code suggest that a betrothal could be contracted in either of two ways: either by conferring an engagement ring as an *arrha* or by written agreement. In other words, the gift of a ring was an unwritten way of sealing a betrothal.<sup>37</sup> The ring was probably normally regarded

<sup>35</sup> *Lex Vis.* 3.1.9, pp. 131–32.

<sup>36</sup> *Ibid.*, p. 131, n. 2. *Nov. Maj.* 6.9.

<sup>37</sup> The evidence consists in phrases such as the following: "post arrarum

as a pledge that a dowry would follow, but the institution of the *arrha* may have provided a way to marry formally but without dotal documentation.

One of Ervig's laws prohibits Jews<sup>38</sup> from marrying within six degrees of consanguinity and requires that henceforth when any Jew or Jewess gets married there should be a written dotal contract and the marriage should be performed within the Church and with the blessing of a priest.<sup>39</sup> The law refers to the fact that Christians are now required to provide written dowries (a reference, presumably, to Ervig's additions to *Lex Vis.* 3.1.9). Any Jew who disregards this law is to be fined 100 solidi or punished by one hundred lashes in public. There is no indication that the marriage of one who disobeyed the law would be dissolved or annulled. The point to note here is that the Jew or Jewess in question, regardless of whether there has been a dowry, is said "to celebrate the nuptial festivity" (*nuptiale festum celebrare*). The law thus seems to presuppose that to get married is a formal act even when there is no dotation; in other words, that becoming married is something more definite than merely beginning to cohabit.

In sum, marriage by betrothal and dotation was no doubt the norm among the Visigoths, but even when there was no dotation, the spouses formally contracted marriage in some way, so that beginning to cohabit did not in itself amount to getting married.

As we have seen, Ervig wanted all marriages among his free subjects to include dotation but did not require that a marriage should be dissolved if this rule was broken. The only text in the *leges* that explicitly requires formal dotation for the validity of marriage occurs in a Roman code, namely in the *Lex Romana Burgundionum*.<sup>40</sup> The text in question comprises

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traditionem, aut facta secundum leges definitionis sponsione" (*Lex Vis.* 3.6.3, p. 170); "aut arrarum aut scripture celebrata confectio" (3.1.4, p. 126); "et anulus arrarum nomine datus fuerit vel acceptus, quamvis scripture non intercurrant" (3.1.3, p. 124).

<sup>38</sup> According to King, the *Iudaei* to which the law refers are those who have become baptized (on pain of punishment and exile) but who have not shown by formal profession that they have converted and who are therefore not counted as *christiani*. See *Law and Society*, pp. 133–35 and 139 ff.

<sup>39</sup> *Lex Vis.* 12.3.8, pp. 435–36. The rubric (*Ne Iudei ex propinquitatē sui sanguinis conubia ducant, et ut sine benedictione sacerdotis nubere non audeant*) appears as one of the canons of the 12th Council of Toledo in AD 681 (see can. 9, *PL* 84:477B).

<sup>40</sup> *Lex Rom. Burg.* 37.1–2, pp. 155–56 (*De nuptiis legitimis sive naturalibus filiis*).

two laws that occur in a section on legitimate marriage and on natural offspring.<sup>41</sup> The first law says simply that a marriage is contracted legitimately if it is celebrated in accordance with the law: that is, if it is contracted with the agreement of the *parentes* or of freemen and if it is preceded by the bestowal of a dowry (*nuptialis donatio*). The second law is a gloss on the classical principle that agreement suffices for marriage. It says that between persons of equal rank agreement suffices for marriage ("consensus perficit nuptias"), provided that formal dotation takes place ("sic tamen, ut nuptialis donatio sollenniter celebretur"). If this condition is not satisfied, the children of the union are not legitimate and are not to be counted among the heirs.<sup>42</sup>

The remarkable thing about this second clause is that it is a reworking of a law in the Theodosian code (together with the *interpretatio*) that it nevertheless contradicts.<sup>43</sup> The latter law, which appears also in the *Breviary*, says that even without dowry and dotal documents a marriage and its issue are legitimate as long as certain other conditions are satisfied: that is, if there is no impediment, if the parties have agreed and are of equal rank, and if neighbours (*amici*) testify to the existence of the marriage.

What influenced this apparently conscious departure from classical Roman tradition is a matter that is open to speculation. As we have seen, there were attempts even within imperial law to make legitimacy conditional upon dotation, although these were limited in their scope and went manifestly against the stream of tradition. The Church had her own reasons for requiring formality and documentation. Lemaire has argued that the requirement cannot have been Germanic in origin,<sup>44</sup> but in my view the status of informal marriage

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<sup>41</sup> Natural offspring, in contexts such as this, are by definition illegitimate. The term "natural" may have other implications (for example, that there is nothing abhorrent or incestuous about the sexual relationship in question).

<sup>42</sup> *Ibid.*, 37.2: "Quod si pares fuerint honestate persone, consensus perficit nuptias; sic tamen, ut nuptialis donatio sollenniter celebretur; aliter filii exinde nati legitimorum locum obtinere non poterint. . ."

<sup>43</sup> *Cod theod.* 3.7.3. The form of *Lex Rom. Burg.* 37.2 (cf. *supra*) is derived from a sentence in the *interpretatio*: "sufficiet aequalibus personis conveniens electio utque consensus, sic tamen, ut conscientia intercedat amicorum" etc. The phrase "inter pares honestate personas" occurs in the constitution itself.

<sup>44</sup> A. Lemaire, "Origine de la règle *Nullum sine dote fiat conjugium*", in *Mélanges Paul Fournier* (1929), p. 422.

and of cohabitation in Germanic law is uncertain, and Lemaire's conclusion is therefore at best unsafe.

A formula from the region of Sens presupposes that marriage is invalid without dotation. This text, probably from the Merovingian period, consists of a charter whereby a man can make his natural offspring his inheritors. The transaction is made in accordance with the Roman law whereby a man who had no legitimate heirs could substitute his illegitimate offspring. But in this case the problem has arisen because the man married his wife without providing a written dowry as the law requires. By law, therefore, the children are not legitimate but "natural."<sup>45</sup> The legislation to which the formula refers, as Lemaire has suggested, may well be that contained in the *Lex Romana Burgundionum*.<sup>46</sup> The fact that the man is nevertheless said to have *married* the woman should warn us that persons who were said to be married were not necessarily legitimately married. We may wonder how the laws on adultery and exclusivity would have applied in this case: for example, would the union have constituted an impediment to marriage with another woman? Be this as it may, we know that dotation was a necessary condition for legitimate marriage according to the *Lex Romana Burgundionum*, and a dotal charter from the region of Sens testifies to the fact that dotation was also necessary there, but these sources pertain to Roman law. They do not tell us the position of Germanic law.

A canon from the Council of Mainz in AD 852 suggests that mere cohabitation might at one time have been sufficient to establish marriage, other things being equal.<sup>47</sup> The canon determines that if a man has a concubine who has not been betrothed to him, and if he then puts her aside and takes as his wife a woman who has been betrothed to him, then the latter woman is his wife. The point to note here is that the decree presupposed that an alliance with a concubine that had not been legitimized *might* be considered to constitute an

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<sup>45</sup> *Cartarum senonicarum appendix* 1a, *MGH Form.*, p. 208: "Ideoque ego ille, dum non est incognitum, ut femina aliqua nomen illa bene ingenua ad coniugium sociavi uxore, sed qualis causas vel tempora mihi oppresserunt, ut cartolam libellis dotis ad ea, sicut lex declarat, minime excessit facere, unde ipsi filii mei secundum lege naturalis appellant. . . ." For the date, see Zeumer's note, *ibid.*, p. 183.

<sup>46</sup> A. Lemaire, "La dotatio de l'épouse," *Rev. hist. de droit français et étranger*, 4th series, 8 (1929), p. 571.

<sup>47</sup> *Conc. Moguntinum* (AD 852) 12, *MGH Capit.* 2, p. 189. Cf. Ben. Lev. 3.60 (PL 97:807B).



impediment to marriage. (In other words, it might be considered to amount to marriage.) Be this as it may, it seems that by the Carolingian period, at least in the eyes of the Church, the difference between a concubine and a wife was simply that the former was not *desponsata* while the latter was, for a woman did not then need to be servile to be regarded as a concubine.<sup>48</sup> Dotation was probably necessary to make the woman *desponsata*. Such requirements probably applied only to the nobility and not to the common people, and certainly not to those with the status of *servi*.

Whence came the Carolingians' insistence on the formalities of petition, betrothal and dotation as conditions for valid marriage? Was it due to the influence of vulgar Roman law? or of Germanic traditions? or of Christianity? The Church had good reasons for wanting marriages to be celebrated at least in a formal and documented manner and preferably in church. It was vital that ministers of the Church should be involved in the process. How else could the ecclesiastical authorities even attempt to ensure that persons did not marry within the forbidden degrees of consanguinity, or did not casually abandon their spouses and marry others? These authorities were not inclined to favour the traditional consensualism and informality of Roman law. Even Justinian had walked down this track, but the Germanic betrothal, which was in effect a formal and witnessed contract, recommended itself to Christian bishops and reformers as something that they could adopt and Christianize. The meeting of families became a public inquiry supervised by the Church.<sup>49</sup>

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<sup>48</sup> See Hincmar, *De divortio Lotharii et Tetbergae*, resp. 21, PL 125:734B. Cf. Jonas of Orléans, *De inst. laicali* II.2, PL 106:171A.

<sup>49</sup> See below, pp. 401–12, *passim*.



**PART TWO**

**MARRIAGE IN THE CHURCH**



## CHAPTER FIVE

### LEX DIVINA: THE DISTINCTION

Christianity did not institute marriage but rather baptized it. In the early Church, converts who had been married before they were baptized became members of Christ's body as married persons, and by converting they committed themselves *ipso facto* to the Gospel's teaching on marriage. Similarly, Christians became married in the same way as their non-Christian neighbours did. In some respects, St Paul's approach to marriage was the same as his approach to slavery: he accepted the civil institution and the laws that defined it, but he explained how the Gospel required persons to behave within these relationships.<sup>1</sup> As a secular institution, marriage was the subject of civil laws that determined who was qualified to marry whom and what were the conditions or criteria for valid marriage. In accepting the fact of marriage, the Church also accepted the secular rules.

Civil law, however, even when modified by the influence of Christianity, did not always seem to be in accordance with Christian values and precepts. For example, civil law might permit a man to divorce his wife and remarry, while the Church, being mindful of Jesus' teaching that the man who divorces his wife and marries another commits adultery, might forbid it. In time, the Church was prepared even to deem invalid a marriage that was valid in civil law. During the fourth century, Western bishops and theologians began to insist that the Church had her own marriage law, and to appeal to a distinction between the human law (*lex humana*) of marriage and the divine law.

In this chapter, I shall consider examples from patristic sources in which authors explicitly contrast the Christian law of marriage with the civil law. The notion of the *lex divina* occurs in many of these sources. In the next chapter, I shall set these and subsequent developments in their historical context.

The following examples appear under four headings, according to the respect in which authors considered the divine law

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<sup>1</sup> Cf. Col. 3:18–19 and 3:22–4:1.

of marriage to differ from human law. These headings pertain respectively to the following questions: whether the prohibition against adultery applies equally to both husband and wife; whether divorce should be freely available, even without the justification of an offense; whether a marriage is dissolved automatically when one spouse is taken captive; and whether one spouse can desert the other in order to follow the monastic life.

*The equality of husband and wife in regard to adultery*

In Roman law, adultery was the crime committed when a married woman had a sexual relationship with a man other than her husband. Both the woman (the *adultera*) and her lover (the *adulter*) were guilty of the crime, the latter because he had had a sexual relationship with another man's wife. Having sex with a woman other than his own wife did not of itself make a man an adulterer in the jurist's narrow sense of that term.<sup>2</sup> This notion of adultery, with its implied double standard, is apparent in Constantine's law on divorce of AD 331, according to which a man may divorce his wife if she is an adulteress (*moecha*). There is no corresponding provision for the woman (*Cod. Theod.* 3.16.1). The law on divorce by Theodosius and Valentinian of AD 449 determined not only that a man could divorce his wife if she were an *adultera* but also that a woman could divorce her husband if he were an *adulter* (*CJ* 5.17.8.2–3), but here the word *adulter* must denote the man who has had sex with another man's wife. A man's having a sexual relationship with a woman other than his wife was not in itself a crime. Such behaviour was acceptable as long as certain proprieties were observed. For this reason, the same law states that a woman may divorce her husband if he consorts with loose women *in the common home*. A man who visited brothels was not culpable, nor was a man who had sex with his slave-girls. He would be culpable if he had a sexual relationship with a married woman, or even with a virgin or widow from a good family.

The Latin Fathers, for the most part, categorically rejected this double standard.<sup>3</sup> They were not motivated by a sense of fair play or because of any inclination to women's liberation.

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<sup>2</sup> See Corbett, *The Roman Law of Marriage* (1930), pp. 141–42; and S. Treggiari, *Roman Marriage* (1991), pp. 262–64.

<sup>3</sup> See for example Ambrose, *De Abraham*, I.4.25, *CSEL* 32.1.2, p. 519; and Augustine, *De adulterinis coniugiis* I.8, *CSEL* 41, p. 355.

The Christian ethos favoured continence, and the Fathers considered sex to be admissible (and even then, somewhat grudgingly) only within the narrowest reasonable confines: that is, within marriage, and preferably for the sake of procreation. These standards applied as well to men as to women. In this respect, the Fathers joined forces with the new puritanism of Graeco-Roman philosophy, a moral teaching that had had some influence among the governing elite in Roman society even before the advent of Christianity.<sup>4</sup> From the Christian point of view, however, the double standard was unacceptable chiefly because of the Gospel's teaching about the very nature of marriage. Jesus had reaffirmed that husband and wife were "two in one flesh." If they became in some way one thing, their relationship was to that degree equal and symmetrical. Paul confirmed the mutuality of the marriage bond in 1 Corinthians 7:2–5, where he said that each partner owned the other's body and each owed the conjugal debt to the other. It followed that extra-marital sex was as culpable for the husband as it was for the wife.

The earliest instances of writers contrasting the divine and human laws of marriage pertain to the rejection of this double standard. Lactantius, for example, writing in the early fourth century, argues that "just as the woman is bound by the bonds of chastity, so that she should not desire a man other than her husband, so also is the husband constrained by the same law, since God joined together man and woman in the union of one body."<sup>5</sup> According to Lactantius, the husband who is unfaithful to his wife is an adulterer in the same way as an unfaithful wife is an adulteress. Divine law rules out the double standard:

... contrary to what is maintained in secular law [*ius publicum*], it is not true that only the wife who has another man is an adulteress, while the husband is not guilty of adultery even if he has several other women. Rather, the divine law joins two people in marriage—joins them, that is, in one body—in such a way that whichever partner divides the union of one body is counted as an adulterer.<sup>6</sup>

If the same standards apply to the man as to the woman, the right of a man to divorce his wife for fornication, which

<sup>4</sup> See Peter Brown, *The Body and Society* (1988), p. 23.

<sup>5</sup> Lactantius, *Epitome* 61(66).8, CSEL 19, p. 748.

<sup>6</sup> Lactantius, *Divinae institutiones* VI.23, CSEL 19, p. 568.

Jesus grants in Matthew 5:32 and 19:9, must be possessed equally by the woman. Jerome vigorously expounds this aspect of the Christian doctrine in his letter to Oceanus and at the same time emphasizes how the law of God and the law of man are at odds in this respect. The letter is a eulogy for Fabiola, who not only divorced her husband but remarried. Jerome contends that she was right to divorce him but wrong to remarry, although her remarrying was excusable because her motives were sound and her understanding of the Gospel was still rudimentary at the time:

The Lord commanded that the woman ought not to be dismissed except on the ground of fornication, and that if she is dismissed, she should remain single [*innupta*]. Whatever commandment has been given to men must apply also to women. For it cannot be that the adulterous woman [*adultera uxor*] should be dismissed while the unfaithful man [*vir moechus*] is to be retained. If "he who is joined to a prostitute becomes one body with her" [1 Cor. 6:16], then likewise she who is joined to a man who is a whoremonger and unchaste is made one flesh with him. The laws of Caesar are different from the laws of Christ. Papinian commands one thing and our own Paul another. Among them, the bridle of chastity is slackened for the men. Only illicit intercourse [*stuprum*] and adultery [*adulterium*] are condemned, while lust is given free rein among prostitutes and slave-girls, as if it were the rank [of the women] and not the promiscuity [of the men] which was the cause of guilt. Among us, what is forbidden to women is equally forbidden to men, and each is under the same obligation to the other.<sup>7</sup>

Two points in this text deserve further comment.

First, Jerome allows himself some freedom of interpretation in regard to the Lord's precepts. According to Jerome, Jesus commands that the woman should not to be dismissed except on the ground of fornication, and that if she is dismissed she should remain single. Jesus himself, in the text Jerome has in mind, says that "everyone who divorces his wife except on the ground of fornication makes her an adulteress," and that "whoever marries a divorced woman commits adultery" (Matt. 5:32). Jerome retains the twofold form of the verse while substituting for its second part a formula derived from 1 Corinthians 7:10. The best way to see what Jerome has done is to compare the texts in question:

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<sup>7</sup> *Epist.* 77 (*Ad Oceanum*) 3, *CSEL* 55, p. 39.



*Jerome* : Praecepit dominus uxorem non debere dimitti excepta causa fornicationis et, si dimissa fuerit, manere innuptam.

*Matthew 5:32 (Vulg.)*: Ego autem dico vobis: Quia omnis qui dimiserit uxorem suam, excepta fornicationis causa, facit eam moechari; et qui dimissam duxerit, adulterat.

*1 Corinthians 11 (Vulg.)*: . . . praecipio, non ego sed dominus, uxorem a viro non discedere (quod si discesserit, manere innuptam . . .) et vir uxorem non dimittat.

Second, Jerome (unlike Lactantius) does not call the unfaithful husband an *adulter*. An unfaithful wife is an *adultera* while an unfaithful husband is a *moechus*. He explains that among the heathens a husband is free to have extra-marital sex with prostitutes and slave girls, but that the heathens do condemn adultery (i.e. sex with married women) and what he calls *stuprum*. The latter word covers such things as bestiality and incest but includes also illicit sexual relationships with virgins and widows of appropriate rank. As it happens, Papinian is our guide here. He explains that while the *lex Iulia de adulteriis* used the words *stuprum* and *adulterium* indifferently, “properly speaking, adultery is committed with a married woman . . . but *stuprum* with a virgin or a widow.”<sup>8</sup>

Ambrosiaster remained an adherent of the double standard. In his view, one should take Matthew 5:32 and 1 Cor. 7:10–11 at face value. A wife may separate from her husband, but she must then remain unmarried, as Paul teaches. A man, on the contrary, may remarry after dismissing his adulterous spouse. This is because “the man is not constrained by the law in the same way as the woman, for the man is the head of the woman.”<sup>9</sup>

Even when bishops accepted that the same rules applied to women as to men, the double standard was too entrenched in Roman society for it to be easily removed in practice, even within the Church. We know from a letter of Innocent I to Bishop Exsuperius of Toulouse in AD 405 that men (in both regions) could commit adultery with impunity.<sup>10</sup> Whatever right to prosecute her husband for adultery a woman may have had in the episcopal courts was *de facto* ineffectual. Exsuperius asks why the Church tolerates adulterous husbands but condemns adulterous wives. Innocent begins his reply by affirming that “the Christian religion condemns adultery equally in both sexes.” (In this text the words *adulter* and *adulterium* are applied in

<sup>8</sup> *Dig.* 48.5.6.1.

<sup>9</sup> Ambrosiaster, *Ad Corinthios prima* 7:11, CSEL 81.2, p. 75.

<sup>10</sup> *Epist.* 6.4, PL 20:499B–500A.

the same way to husbands as to wives.) Turning from doctrine to practice, Innocent explains that it is not easy for wives to prosecute their husbands for adultery because it is easier for men than for women to commit the crime clandestinely. The woman may have her suspicions, but proof is difficult and hidden crimes cannot be punished. It is much easier for a man to prosecute his adulterous wife before an episcopal tribunal (*apud sacerdotes*<sup>11</sup>), and once the crime has been proved, the woman may be excommunicated.

*Ambrose and Augustine on divorce "sine crimine"*

Both Roman and Mosaic law permitted remarriage after divorce. According to Ambrose and Augustine, on the contrary, remarriage while one's spouse is alive is always adultery, even if follows a divorce that is valid in civil law and even if the person in question has divorced his (or her) spouse on the ground of adultery. A passage from Ambrose's *De Abraham* shows how much the standards of the Western Church differ from those of Roman law.<sup>12</sup> Not only does a man who remarries after divorcing his wife commit adultery, Ambrose argues, but his crime is all the more serious because he has sought legal justification for his sin. He would be less guilty if he had simply committed adultery informally, without getting a divorce first. Far from justifying an alliance with another woman, a civil divorce exacerbates the man's infidelity.

Two texts are worthy of examination here, one from Ambrose's commentary on Luke's Gospel and the other from Augustine's *De nuptiis et concupiscentia*. Both affirm that while secular law freely permits remarriage after divorce, the law of God prohibits it. Both seem to presuppose a civil regime on divorce that is much more liberal than that which Constantine imposed in AD 331. And both contain the phrase *sine crimine* ("without fault"), which is ambiguous and requires careful consideration.

The text from Ambrose (d. 397) is as follows:

Therefore you divorce your wife as if by right without fault [*quasi iure sine crimine*], and you consider that you are allowed to do this because human law [*lex humana*] does not forbid it. But

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<sup>11</sup> Cf. *Cod Theod.* 1.27.2, on putting a case to arbitration before an episcopal tribunal: "Episcopale iudicium sit ratum omnibus qui se audiri a sacerdotibus elegerint."

<sup>12</sup> *De Abraham* 1.7.59, CSEL 32.1.2, p. 541.

divine law [*lex divina*] does forbid it. You, who are obedient to men, should fear God. Listen to the law of the Lord, who is obeyed even by the men who make laws: "What God has joined together, let not man separate" [Matt. 19:6]. . . . But perhaps someone says, "Why then did Moses command one to give a bill of repudiation and to divorce his wife [Matt. 19:6]?" He who says this is a Jew, not a Christian. And therefore, to the one who puts this objection to the Lord, the Lord replies, "Moses allowed you to give a bill of repudiation and to divorce your wives because of the hardness of your hearts, but from the beginning it was not so."<sup>13</sup>

Ambrose goes on to consider the significance of Jesus' remarks about the Mosaic law of divorce.

The passage from Augustine's *De nuptiis et concupiscentia* (written ca. AD 418–20) is as follows:

The observance of this sacrament is so great "in the city of our God, in his holy mountain" [i.e., in the Church] . . . that while women marry and men take wives "for the sake of procreating children," it is not lawful to leave a wife who is sterile in order to take another who is fruitful. And if any man should do so, he is held guilty of adultery by the law of the Gospel [*lex evangelii*], just as in the case of a woman who remarries; though not by the law of this world [*lex huius saeculi*], which permits men to take other partners and marry again after a repudiation has been issued without fault [*interveniente repudio sine crimine*]. Moses also, the Lord tells us, permitted the Israelites to do this because of the hardness of their hearts.<sup>14</sup>

Let us first consider the phrase *sine crimine*. It is ambiguous, for the point being made might be either: (1) that no blame attaches to the man who divorces his wife; or (2) that a man may divorce his wife even without the justification of any fault on her part.<sup>15</sup> G. H. Joyce opts for the first alternative (divorce is not a crime) in translating the passage from Ambrose.<sup>16</sup> The second alternative (there is no crime justifying divorce) appears in the translation of Augustine's *De nuptiis* published in

<sup>13</sup> *Expositio evangelii Lucae*, VIII.5 and 7, CSEL 32.4, p. 394.

<sup>14</sup> *De nuptiis et concupiscentia* I.11, CSEL 42, p. 223.

<sup>15</sup> It may be noted, in regard to Ambrose's phrase *quasi iure sine crimine*, that with alternative-1 the word *quasi* qualifies *sine crimine* (as well as *iure*) while with alternative-2 it does not. Thus we have two possible senses: (1) "you divorce your wife as if you had the right to do so, as if this were not a crime;" (2) "you divorce your wife as if you had the right to do so, even when she has committed no crime."

<sup>16</sup> *Christian Marriage* (1933), p. 311: "You dismiss your wife as though you had the right to do so, and were open to no reproach on this score."

the *Nicene and Post-Nicene Fathers* series.<sup>17</sup> Although each option seems *prima facie* appropriate to its context, there is good reason to believe that Joyce is mistaken and that the second alternative is correct in both cases.

It is clear that the first alternative (divorce is not a crime) will not do in Augustine's case, for it would produce an unacceptable pleonasm: namely, that the law permits something to be done legally. But if one adopts the second interpretation in the case of Augustine, there is good reason to adopt it also in the case of Ambrose, for the two texts are notably similar. Moreover, the arguments to which Ambrose appeals in support of the Christian prohibition would lose their rhetorical force if the woman in question had committed some crime, such as adultery, that might be considered serious enough to justify her repudiation. Ambrose argues, following Matthew 5:32, that a divorced woman is at risk because she may be driven by sexual desire to commit fornication by remarrying. Divorce offends charity, and divorcing a woman in the fragility of her youth leaves her prone to danger, while leaving a woman destitute in her old age shows a lack of *pietas*. If the emperor respects and takes care of his veterans, and if a responsible farmer does not turn out the farm labourer who has grown too old to work, how much more should a man keep faith with his wife, who is not his subject but his equal?<sup>18</sup> Ambrose's rhetoric demands that we consider the woman in question to be innocent, and to have been driven out because of some flaw, such as old age, for which she cannot be blamed. It is true that Ambrose also appeals to the husband's responsibility to tolerate and emend his wife's behaviour,<sup>19</sup> but there is no indication that he has in mind divorce for serious offenses, such as adultery. On the contrary, in the case of fornication Ambrose would permit the man to divorce his wife, although not to marry another woman. I submit, therefore, that divorce *sine crimine* is divorce *sine causa* in both passages.

If this interpretation is correct, both texts presuppose the existence of very liberal regime that permits a man to divorce his wife even *sine crimine*. The passage from the *De nuptiis* ech-

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<sup>17</sup> *A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church*, vol. 5, *St Augustin, Anti-Pelagian Writings*, p. 268: "... though not by this world's rule, which allows a divorce between the parties, without even the allegation of guilt. . . ."

<sup>18</sup> VIII.4, pp. 393-94.

<sup>19</sup> *Ibid.*, p. 393.

oes one from Augustine's *De bono coniugali* (ca. AD 401), where Augustine likewise remarks on the indissolubility of marriage "in the city of our God, in his holy mountain." Who does not know, Augustine asks, that the laws of the gentiles (*iura gentilium*) are otherwise? Among these people, either spouse may remarry after a repudiation even without the justification of any guilt on the other's part. Augustine adds that Moses permitted divorce and remarriage because of the Israelites' hardness of heart.<sup>20</sup> Augustine presupposes that the laws of the "gentiles" freely permit divorce.

How are we to square this with the fact that in AD 331 Constantine determined which crimes justified repudiation (*Cod. Theod.* 3.16.1)? Since this constitution was primarily intended to prevent repudiation for offenses other than those stated, one might argue that it says nothing about divorce *sine causa*. Honorius's law of AD 421, however, which amplifies and modifies Constantine's law, refers explicitly to persons who divorce without cause or merely because of dissent.<sup>21</sup> Honorius prohibits divorce of that kind. A spouse may divorce the other only on the ground of one of the stated crimes. If Augustine had referred to the law of the pagans or of the infidels, then one might argue that the secular law in question was Roman law before Constantine's conversion. But Augustine expressly refers to *lex huius saeculi*: in other words, to the human law of his own world and of his own time. The phrase can only denote contemporary Roman civil law.

Was Augustine referring to divorce *bona gratia* or to consensual divorce? Nothing in the Roman law of marriage was more at odds with ecclesiastical doctrine than the right to divorce by mutual agreement. Moreover, a text in the *Digest* includes sterility as one of the common reasons for *divortium bona gratia* (*Dig.* 24.1.60–62). In the above passage from the *De nuptiis* and elsewhere, Augustine sees in the fact that a Christian man may not divorce even a sterile wife, despite having married "for the sake of procreating children," the crux of his theory of the *sacramentum*. And since the word *repudium*, by its etymology, connotes disdain or contempt, it might seem that the phrase *interveniente repudio* would not denote amicable or consensual divorce.

<sup>20</sup> *De bono coniugali* 8, CSEL 41, p. 197: "ubi interposito repudio sine reatu aliquo ultionis humanae. . ."

<sup>21</sup> *Cod. Theod.* 3.16.2: "si [uxor] nullas probaverit divortii causas;" "si [maritus] matrimonium solo maluerit separare dissensu."

This last supposition is not true. In a rescript of AD 497, Anastasius ruled that if, by the *mutual agreement* of both husband and wife while they were married, a notice of repudiation (*repudium*) had been sent which contained none of the reasons for divorce specified by Theodosius and Valentinian (in AD 449), the woman could remarry after one year (*CJ* 4.17.9). And the Roman code of the Burgundians states that with the consent of both spouses, a *repudium* may be given and the marriage dissolved.<sup>22</sup> Likewise, the charters for divorce by mutual consent found in early medieval Frankish formularies bear the title *Libellum repudii*.<sup>23</sup>

Augustine's argument itself shows that he must be referring to unilateral divorce. The Christian man, he affirms, may not dismiss even a sterile wife, whereas the same prohibitions do not obtain in Roman law. Moreover, he says that the law of Moses is much the same as that of Rome; divorce under Mosaic law was unilateral. The other text, from Ambrose, explicitly refers to the divorce of women by men, and implies that the divorced women would be most unwilling. Divorce by mutual agreement does not provide the solution. The only credible alternative is that Constantine's rules were no longer in effect when these texts were written, and that Roman law had reverted to the lax position of pre-Christian times.

As it happens there is another text—a curious and obscure aside in a work now ascribed to Ambrosiaster—which corroborates this conclusion. The passage is as follows:

Before the edict of Julian, women were unable to divorce their husbands, but once they had been given the power to do so they began to do what they had not been able to do before. For they began to divorce their husbands every day, without restraint.<sup>24</sup>

Scholars of Roman law have argued on the basis of this text that the pagan emperor Julian removed the restrictions upon divorce imposed by Constantine. Julian's law on dowries preserved in the Theodosian Code may be a fragment of the edict to which Ambrosiaster refers.<sup>25</sup> If this thesis is correct, it is

<sup>22</sup> *Lex Romana Burgundionum* 21.1 (*MGH Leges* 2.1, p. 143).

<sup>23</sup> Tur. 19, Marc. II.30, Merk. 18 (*MGH Form.*, pp. 94, 145, and 248).

<sup>24</sup> *Quaestiones veteris et novi testamenti* (Ps.-Augustine), cap. 115, *CSEL* 50, p. 322.

<sup>25</sup> I.e. *Cod. Theod.* 3.13.2, dated AD 363. See R. S. Bagnall, "Church, state and divorce in late Roman Egypt," in *Florilegium Columbianum*, ed. K.-L. Selig and R. Somerville (1987), pp. 42–43; and H. J. Wolff, "Doctrinal trends

probable that restrictions were not imposed again until Honorius's law of AD 421, which re-introduced Constantine's rules in a modified and elaborated form. Augustine wrote the *De nuptiis et concupiscentia* just before the end of the liberal period.

Why does Ambrosiaster refer only to wives who divorce their husbands? It may be that this was a consequence of Ambrosiaster's own peculiar preoccupations, for he emphasized the inferior and subordinate status of women where others emphasized equality.<sup>26</sup> Furthermore, he argued that while a man could divorce his spouse for adultery and then remarry, a woman could not, and this because the husband is the head of the wife.<sup>27</sup> Freedom to divorce and remarry would have seemed much more shocking to Ambrosiaster in the case of women than of men. Moreover, the right of women to divorce their husbands was contrary to the Mosaic law, while the man's right was not. It is not probable, in any case, that Julian's edict gave women more freedom in this matter than men, and Ambrosiaster suggests that under Julian the right of women to divorce their husbands was virtually unrestricted. Augustine's view of the difference between the "law of the Gospel" and the "law of this world," and his perception of the uniqueness of the Church's position, would have been much less sharply focused if Constantine's rules had still been in force. From his perspective, at least until AD 421, it must have seemed that while marriage in the City of God was a permanent bond, marriage in City of Man was hardly a bond at all but a temporary partnership, and that the State made no effort to prevent dissolution and remarriage.

#### *Captivity (Innocent I and Leo I)*

Under Roman law, as we have seen, the rights and duties of a person whom a foreign power held captive outside Roman territory ceased or at least went into abeyance. He was no longer a citizen, and someone else could claim his property in land and slaves. His marriage was automatically dissolved (*Dig.* 24.2.1; 24.3.10, pr.; 49.15.12.4). If this person was later set free and he returned to Roman territory, he would regain his citizenship, his rights and his property in land and slaves by what

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in postclassical Roman marriage law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 67 (1950), p. 262.

<sup>26</sup> See P. L. Reynolds, "Bonaventure on gender and Godlikeness," *Downside Review* 106 (1988), pp. 174 ff.

<sup>27</sup> Ambrosiaster, *Ad Corinthios prima* 7:11, CSEL 81.2, p. 75.

was called *postliminium* (*Cod. Theod.* 5.7.1). His marriage was not automatically reinstated, however, although the partners might renew it by mutual agreement (*Dig.* 49.15.14.1). While he was in captivity, his wife was free to remarry, and in that case her former husband, if he returned, had no right to claim that he was still married to her or to get compensation for losing her (*Dig.* 49.15.8). The sex of the captive was immaterial in this regard: the same laws applied when a wife was taken captive and her husband was left (*Nov.* 22.7).

Justinian tried to prevent remarriage in such cases (*Nov.* 22.7, AD 536). The jurists had reasoned that the former marriage ceased because the captive was effectively servile, but Justinian found this interpretation to be specious, over-subtle and inhumane. The remaining spouse ought not to remarry unless she (or he) knows that the other has died. If this cannot be ascertained, she should wait at least five years before marrying. As always in such matters, the Emperor's reason for opposing dissolution and remarriage was humanitarian rather than theological. Furthermore, while Justinian penalized remarriage in such circumstances (except as allowed by the terms of his edict) and considered it rash, he did not invalidate it or make provisions for an ex-captive to reclaim his spouse.<sup>28</sup>

The position of the Church in Rome was different. If husband and wife became one flesh and were united for life, surely the captivity of one partner should not dissolve the marriage. In a letter to a certain Probus (presumably a civil official), Innocent I records that a barbarian invasion has brought a case before him in his capacity to give legal decisions (*facultas legum*).<sup>29</sup> While the date of the letter is unknown, the barbarian invasion to which it refers must be that of the Visigoths, who sacked Rome under Alaric in AD 410. The details of the case were as follows.

A well-established marriage had existed between a man called Fortunius and his wife, Ursa. Ursa was taken captive and Fortunius married again. Ursa was released and returned to Rome, where she avowed to Innocent, with none dissenting, that she was Fortunius's wife. Fortunius, we should note, had acted ac-

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<sup>28</sup> The wife of a soldier missing in action had to prove that he was dead before remarrying. If she gave false evidence and remarried, and if the soldier returned, he could then reclaim his wife (*Nov.* 117.11).

<sup>29</sup> *Epist.* 36, *PL* 20:602B–603A. "Conturbatio procellae barbaricae facultati legum intulit casum."



cording to his rights by the civil law, but according to Innocent the rules of the Church (*sancta religionis statuta*) were different.

As G. H. Joyce has pointed out, the phrase *facultas legum* suggests that Innocent was acting in the capacity given to the bishops by Constantine to hear legal cases and make binding judgments (*Cod. Theod.* 1.27.1).<sup>30</sup> By AD 410, however, this power extended only over religious issues, for in AD 399 Honorius had determined that the bishops should hear only religious cases and that other matters should be dealt with according to Roman law and (we must presume) in civil tribunals.<sup>31</sup> This would not prevent a bishop from arbitrating in a civil matter when both parties agreed to it (cf. *Cod. Theod.* 1.27.2), but it is unlikely, in view of the nature of this affair, that Fortunius would have agreed to take the case to the Bishop of Rome, and Innocent states explicitly that it was Ursa who approached him. This line of argument suggests that by AD 410 such cases might be regarded as religious, and that a woman in Ursa's position had the right to take her case before an episcopal tribunal. Ursa would not have found any redress under the civil law. There would have been no point in her going "to law before the unrighteous," as St Paul puts it (1 Cor. 6:1). It is improbable that this tribunal's judgment would have had any civil consequences, or that Innocent could have applied any sanctions other than ecclesiastical ones, although it is possible that the local power of the Bishop of Rome was exceptional and extended into the civil arena. The judgment Innocent conveyed to Probus was as follows:

... we determine, with the support of the Catholic faith, that the alliance which was formerly established with God's favour (*gratia divina*) is a marriage, and that the alliance with the second woman, as long as the first wife survives and has not been dismissed in a divorce, cannot by any means be legitimate.

How should one interpret the words: "as long as the first wife . . . has not been dismissed by divorce"? From the premise that Fortunius cannot remarry as long as Ursa has not been divorced it does not follow in strict logic that he *would* be able to remarry if she *had* been divorced. Nevertheless, this is the rhetorical implication of the text. G. H. Joyce sought to evade this conclusion by arguing that Innocent, speaking in

<sup>30</sup> G. H. Joyce, *Christian Marriage* (1933), p. 317.

<sup>31</sup> *Cod. Theod.* 16.11.1. See also 16.2.23.

his capacity to give legal decisions, meant that the second marriage was "invalid not only ecclesiastically, but by civil law as well."<sup>32</sup> Similarly, according to Crouzel's interpretation of the text, Innocent meant that remarriage could not be allowed *even* by civil law, since there had been no divorce.<sup>33</sup> But this kind of interpretation is unsatisfactory because in civil law the dissolution of marriage in cases of captivity was automatic and required no act of repudiation. Fortunius, as we have said, was acting by his rights according to the civil law.

It seems, therefore, that Innocent allowed for the possibility of divorce and remarriage in certain circumstances. The circumstances in question may have occurred only in exceptionally difficult cases, such as captivity. It would not be very surprising or shocking, for example, to find that the Church was willing to dissolve a marriage and to permit remarriage after a certain period had elapsed if there was no way of knowing whether the captive was alive or dead. Then, if the captive later returned, he (or she) would not be able to reclaim his spouse. It is possible that Innocent was prepared to allow divorce after the captive had returned if he or she did not wish to reclaim his or her spouse. (As we shall see, it seems that even Pope Leo was prepared to concede that the second marriage should endure if the man returning from captivity did not wish to reclaim his wife.) This policy would have involved a degree of compromise and an implicit admission that pastoral considerations might override theological ones. It would probably not have found favour with purists like Jerome and Augustine. But if we assume that the divorce Innocent had in mind applied only in these difficult circumstances, we need not be too embarrassed by Innocent's stance in his letter to Bishop Exsuperius, dated AD 405. According to this letter, spouses who repudiate their partners and remarry while the former partners are still alive are committing adultery.<sup>34</sup> In cases of captivity, it would often have been impossible to know whether the missing person was alive or not.

The problem of marriage and captivity appears in a rescript of AD 458 by Pope Leo I to Bishop Nicetas of Aquileia, on the northern coast of the Adriatic.<sup>35</sup> Leo notes that while the

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<sup>32</sup> *Ibid.*, p. 317 with n. 2.

<sup>33</sup> P. Courcelle, *L'Église primitive face au divorce* (1970), p. 281.

<sup>34</sup> *Epist.* 6.6, *PL* 20:500–501.

<sup>35</sup> *Epist.* 159, *PL* 54:1136 ff. The section on marriage and captivity con-

matters raised by Nicetas are very difficult to judge, care must be taken that the wounds of war are healed by religious principles. The hostility to which Leo refers must have been that brought by Attila's Huns, who invaded Northern Italy in AD 452. Some men have been taken captive and their wives left destitute. And some of the latter, presuming either that their husbands had died or that they would never be set free, could not bear their loneliness and remarried. But now, with the Lord's help, the situation has improved, and some of those who were thought to have perished have returned. What is to be done, Nicetas asks, if they have returned to find that their wives have remarried?

Leo sympathizes with Nicetas's indecision but reminds him of the teaching of Scripture: "a woman is joined to her husband by God;"<sup>36</sup> and "what God has joined let not man put asunder" (Matt. 19:6). "The compact of legitimate marriage must be reintegrated." When the evils of hostility have passed, to each must be restored what he once legitimately possessed, and every care should be taken that each should receive what is his own.

The unfortunate man who had married the captive's wife was not culpable. Leo writes:

Nevertheless, the man who took the place [*persona*] of her husband, reckoning that the latter did not exist, should not be judged as culpable or as the invader of another's right. For in this way many things which belonged to those who were taken into captivity may have passed into the rights of others. But it is altogether just that when they return, their property should be restored to them. Now if this is rightly observed in the matter of slaves or of land, or even of homes and possessions, how much more should this be done when it comes to the re-establishment of a marriage, so that what the adversities of war have disrupted should be restored by the remedy of peace.<sup>37</sup>

In other words, since the husband who had been taken captive was presumed to have died, no blame attaches to another man who took the woman as his wife. If it turns out that the captive has not died after all, then the second marriage is strictly null and the second man must relinquish the woman to her true husband if the latter wishes to claim her.

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sists in cc. 1-4, cols 1136-37.

<sup>36</sup> "... a Deo jungitur mulier viro..." a Latin reading of LXX Prov. 19:14. Ambrose, *Expositio evangelii Lucae*, VIII.2-3, CSEL 32.4, pp. 392-93, gives the reading: "a Deo autem praeeparabitur viro uxor."

<sup>37</sup> Cap. 2, 1136C-1137A.

The rights upon which Leo based his argument were those of the *postliminium*. A constitution of AD 366, preserved in the Theodosian code, determined that those who returned from captivity might regain "by right of *postliminium* whatever they formerly held in land or in slaves," even if such property had passed to the imperial fisc or had been given by the Emperor to someone else.<sup>38</sup> Civil law explicitly excluded marriage from the scope of what could be restored by *postliminium*.<sup>39</sup> Leo's argument is that if such applies in the case of possessions such as slaves and land, why should it not apply in the case of wives?<sup>40</sup> It might seem that this second, legalistic, argument is fundamentally different in nature from the first: namely, that husband and wife are united by God and cannot be separated by any human agent. But the unstated premise that allows Leo to apply the rights of *postliminium* to marriage comes from 1 Corinthians 7:3–4, according to which each partner in a marriage owes his or her body to the other. The notions of the conjugal debt and of a kind of reciprocal ownership in marriage are closely related to the notion that the partners are joined together and become one flesh. It is significant that Justinian, while attempting to tighten up the law on dissolution in cases of captivity, did not do so by extending *postliminium* to such cases. Where Leo considers marriage to be a compact and a matter of rights, Justinian still treats it as a "social fact." Leo's interpretation of the precepts of Jesus and St Paul is such that he treats marriage as a kind of contractually formed reciprocal ownership and thereby brings it under the scope of *postliminium*.

Perhaps because of the logic of mutual rights, Leo does not insist that the former marriage must always be re-established. He only requires that the man returning from captivity has the *right* to get his wife back if he so wishes:

And therefore, if men who have returned after long captivity so persevere in the love of their wives that they want them to come back to their partnership, then that which misfortune brought

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<sup>38</sup> *Cod. Theod.* 5.7.1 (=CJ 8.50.19): "recepturos iure postliminii ea, quae in agris vel mancipiis [seu aliis rebus] ante tenuerunt." The phrase in parentheses is absent in *Cod. Theod* but appears in *CJ*.

<sup>39</sup> See *Dig.* 49.15.14.1; 49.15.8; 49.15.12.4.

<sup>40</sup> Col. 1137A: "Quod si in mancipiis vel in agris, aut etiam in domibus ac possessionibus rite servatur, quanto magis in conjugiorum redintegratione faciendum est. . . ."

about should be set aside and what fidelity demands should be restored.<sup>41</sup>

The ex-captive is not obliged to take back his wife, even though she is blameless. Nor does Leo suggest that the second marriage should be formally annulled if the first husband does not wish to reclaim his wife. Since he calls only the first marriage *legitimum*,<sup>42</sup> he may have tolerated the second marriage as a matter of concession without recognizing its validity. As for women who are "so seized by love of their second husbands that they refuse to return," they are in disgrace and communion is denied to them. In other words, the Church excommunicated them (the strongest sanction available in ecclesiastical law).

Was Leo more moved by men's than by women's misfortunes? Was the woman simply a man's property, to be reclaimed in the same way as land and slaves, regardless of her feelings and affections? To reason thus would be to miss the point entirely. The woman's second husband would be equally hurt by the disruption of their marriage. The ex-captive had a prior claim not because of his sex (which was immaterial) but because his claim was based upon the only true and legitimate marriage. His partner owed herself to him by virtue of their marriage vows. She had given herself to him, as he had given himself to her, for better or for worse. The situation would have been the same (as in the case settled by Innocent) if the wife was the one who had been taken captive and later unexpectedly returned.

According to the jurists, it was not the captive's presumed death that dissolved the marriage, but rather his status. His captivity created an impediment of inequality. Civil law itself, however, only determined *that* captivity dissolved marriage; it did not determine *why*. Leo seems to have known nothing of the argument that becoming a captive was equivalent to becoming a slave. When he argued that the second husband was not culpable, he presumed that the woman had remarried because she had supposed that her first husband had died. From this point of view, there would have been no distinction of principle between the case of the captive and the case of

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<sup>41</sup> Cap. 31, 1137A: "The word *necessitas* in this letter (cf. 1136A9, 1137A7 and 1137B11) means something like "harsh and unavoidable adversity." Clearly, the woman does not *have* to remarry.

<sup>42</sup> See 1136B13 and 1137B3.

the soldier missing in action.<sup>43</sup> The crux of the matter from Leo's point of view was whether the mere presumption of death was sufficient grounds for dissolving a marriage. He believed that presumption alone could never be sufficient. If it was reasonably certain that the captive had died, one would be justified in remarriage on this assumption, but there was a risk. One's assumption might be wrong. If the captive returned, he or she had the right to reclaim the other partner, remarried or not.

*Divorce and conversion to the monastic life*

As we have seen, Justinian permitted either spouse to dissolve a marriage in order to devote him- or herself to a chaste religious life (normally in a monastery). This much is clear, but in some respects the texts in question are difficult to interpret.

In the novel of AD 535, Justinian noted with approval that either spouse might dissolve his (or her) marriage for this reason. The point of the law was that because someone who did this forsook one way of life to follow another, he was deemed to have died as far as his marriage was concerned. If there was any agreement in existence (such as a will) whereby one spouse was to have benefited on the occasion of the other's death, this came into effect when the latter converted to the religious life (*Nov.* 22.5). The situation envisaged here was clearly that in which one partner entered religion, leaving the other in the world. (The remaining partner, one presumes, was free to remarry.) We are not told whether the spouse who became a religious required the other's consent.

In the novel of AD 542, in the course of a series of laws on divorce, Justinian forbade divorce by mutual consent in general but left one exception: namely, that persons might divorce in order to follow a life of chastity. Penalties were determined for the person, whether male or female, who dissolved a marriage by agreement (*ex consensu*) for the sake of conversion and who then either remarried or lived licentiously (*Nov.* 117.10). Here dissolution was expressly by mutual consent, but it not clear whether both spouses had to agree to convert to the life of chastity, or whether it sufficed that both agreed that one of them should so. The latter interpretation is more probable.

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<sup>43</sup> Justinian does distinguish between these situations and legislates differently for them: cf. *Cj* 5.17.7 and *Nov.* 117.11 (on the missing soldier) and *Nov.* 117.12 and 22.7 (on captivity).

Perhaps the strictest civil laws on divorce in late antiquity are those of the *Lex Visigothorum*. According to Chindasvind, a man might not divorce his wife on any ground except adultery (“excepta manifesta fornicationis causa”), and a woman could not divorce her husband even on that ground. Chindasvind’s rules followed the precepts of Jesus in Matthew’s gospel to the letter. Separation for the sake of religion was not forbidden, but in that case neither spouse could remarry. Chindasvind ruled that “if there is the desire for conversion to God, let their mutual agreement (that is, the man’s and the woman’s) be clearly ascertained by a bishop [*sacerdos*], so that afterwards neither of them has any excuse for getting married again.”<sup>44</sup> (This may imply that both partners were supposed to convert.) According to a law of Reccesvind, a man or a woman could break off a betrothal to enter a monastery, but only if there was mutual consent or if the one who converted was dangerously ill. He stresses that in such cases one ought make sure that the religious aspiration was genuine.<sup>45</sup>

Divorce for the sake of conversion to the religious life was rejected at a Council of Gangra, in Africa, of unknown date. The canon in question survives in a collection made by Ferrandus, a deacon at Carthage, between AD 523 and 546. It decrees that “if any woman dismisses her husband for the sake of religion, let her be anathema.”<sup>46</sup>

In AD 596, Pope Gregory the Great wrote to Urbicus, Abbot of a monastery at Palermo, regarding a married man called Agatho who wished to join the monastery. Gregory explains that the community should receive and encourage Agatho, but only if his wife also wishes to convert. For when two persons marry, they become one body, and it is not fitting that one part of this body should convert while the other part remains in the world.<sup>47</sup> The Pope’s directions were apparently ignored, for in a letter of AD 601 to Adrian, a notary of Palermo, he says that Agatho’s wife has complained that her husband went

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<sup>44</sup> *Lex. Vis.* 3.6.2, *MGH Leges* 1, p. 167.

<sup>45</sup> *Lex. Vis.* 3.6.3, p. 170. A betrothal could always be dissolved by mutual consent and no justification was needed: see 3.1.3, p. 124. Reccesvind may envisage in 3.6.3 a situation in which one partner, by falsely claiming to be converting to God, deceitfully persuades the other to consent to breaking the espousal.

<sup>46</sup> Ferrandus, *Breviatio canonum* 164, in C. Munier (ed.), *Concilia Africae*, CCL 149, p. 301.

<sup>47</sup> Gregory I, *Registrum epistularum* VI.49, CCL 140, p. 422.

to live in the monastery against her will. Gregory directs Adrian to make diligent inquiries and to ascertain whether she consented and whether she herself promised to convert. If this turns out to have been the case, she must fulfil her promise. If not, and if she has not committed fornication (which is the only ground on which a man may dismiss his wife), then the man should be compelled to return to his wife lest his separation should be an "occasion of perdition" for her. For although the law of this world (*mundana lex*) rules that a marriage may be dissolved for the sake of conversion even when one spouse is unwilling, divine law forbids this. Gregory repeats to Adrian the theological explanation (regarding union in one body) that he had given in the previous letter.<sup>48</sup>

Pope Gregory had occasion to expound his position more fully in another letter written in the same year, this time to Theoctista, the Emperor's sister, in Constantinople. As far as we can tell from the extant sources, this was the nearest any representative of the Western Church got to protesting to the Emperor about imperial divorce law. Gregory now affirms that those who claim that marriages can be dissolved for the sake of following the religious life are not really Christians! Not only Gregory himself but all Catholic bishops and the universal Church anathematize them. Even if the *lex humana* rules that marriages can be dissolved for the sake of religion, the *lex divina* forbids it. Jesus said, "what God has joined man may not separate," and that "one may not dismiss his wife, except on the ground of fornication." It is written that "they shall be two in one flesh." If they have become one flesh, it cannot be proper for one spouse to lead a life of continence in a monastery while the other remains in the world and risks becoming polluted by illicit relations. If both agree to convert, this is well and good. Marital relations are not illicit, but one may renounce even licit things—good things, such as food, that God created for our use—for the sake of an increase of merit or in compensation for some previous demerit.<sup>49</sup>

What Gregory forbade, and feared that Agatho had done, was not exactly the same as what he said human law permitted. On the one hand, Gregory ruled that one spouse could not convert and leave the other in the world. Only if they mutually agreed that *both* would convert could either of them

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<sup>48</sup> *Ibid.*, XI.30, CCL 140A, pp. 918–19.

<sup>49</sup> *Ibid.*, XI.27, pp. 908–10.



do so. His explicit objection here was not that Agatho had converted without his wife's consent, but that the former was in a monastery while the latter remained in the world. Gregory would clearly have ruled out remarriage *a fortiori* on the same grounds (namely, that husband and wife are one flesh and cannot be separated), but in fact the question of remarriage did not arise. On the other hand, the precept that Gregory attributed to human law was that marriages could be dissolved for the sake of conversion even without the agreement of the other partner.<sup>50</sup> Here it was the lack of consent that was crucial. Gregory seems to have assumed that where there was mutual agreement there would also be mutual conversion. In other words, there would be *consensus* in the strong sense that the partners were of one mind in this matter.

The civil law to which Gregory referred may have been Justinian's novel of AD 535 (*Nov.* 22.5). Justinian's novels were officially promulgated in Italy in AD 554.

### *Conclusion*

The Latin Fathers contrasted the human and divine laws of marriage in respect both of their content (that is, of what the respective rules permitted or prohibited) and in respect of their authority. Human laws were merely human and would pass away. Insofar as they contradicted divine laws, they had to be regarded as imperfect or wrong. The contrast also implied a comparison, and thus an assimilation, for when the Fathers affirmed that the *lex humana* permitted something that the *lex divina* prohibited, they were presenting Jesus' teaching on divorce as something comparable and alternative to civil law. At the same time, this very assimilation set the prohibition of remarriage after divorce beyond compromise and qualification. Since God was the legislator, this law was absolute and unchanging.

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<sup>50</sup> XI.27, p. 909, lines 193–195: "Si enim dicunt religionis causa coniugia debere dissolui, sciendum est quia, etsi hoc lex humana concessit, lex tamen diuina prohibuit." XI.30, p. 919: "etsi mundana lex praecepit conversionis gratia utrolibet inuito solui posse coniugium, diuina haec lex fieri non permittit."

## CHAPTER SIX

### LEX DIVINA: THE HISTORICAL CONTEXT

When Ambrose, Jerome, Augustine and Pope Gregory distinguished between the divine and human laws of marriage, they presupposed that the Church was a legislative authority whose marriage law could abrogate that of the State. In their eyes, the Church's law of marriage was divine law. Just as the Emperor was the head of the Roman State, so Christ was the head of the Church, and just as the Emperor was the State's *legis lator*, so Christ was the Church's *legis lator*. That is why Pope Gregory writes:

if they say that marriages ought to be dissolved for the sake of religion, it should be understood that even if human law allows this, the divine law nevertheless forbids it. For Truth itself says: "what God has joined man may not separate" [Matt. 19:6]; and it also says: "a man cannot divorce his wife, except on the ground of fornication" [Matt. 19:9]. Who would contradict the heavenly legislator?<sup>1</sup>

Similarly, Jerome compares Christ to Caesar and St Paul to Papinian. Christ, like a Roman emperor, issued the laws of marriage, while Paul, like a Roman jurist, interpreted them.<sup>2</sup> When one remembers the treatment of law in the New Testament, one may find Jerome's attribution of these roles to Jesus and Paul unexpected and startling.

To understand what these claims implied in the minds of those who made them, one must consider the characteristics of law in general and of Roman law in particular, and one needs to place the claims in their historical context.

#### *The rule of law*

It is worth stating the obvious at this point. A ruler arbitrarily imposing his will upon individuals is not thereby legislating. The basic components of law are certain forms of authority, relatively fixed rules and a means of enforcement. The last

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<sup>1</sup> *Registrum epistularum* XI.27, CCL 140A, p. 909.

<sup>2</sup> *Epist* 77 (*Ad Oceanum*) 3, CSEL 55, p. 39.

element normally involves penalties for law-breakers. A legal system, therefore, such as Roman law, consists in a set of determinate and promulgated rules that are enforced by the proper authorities and by means of prescribed sanctions. Considered materially, a legal system is a collection of texts that can be applied to particular cases. These texts may or may not appear in the form of a *codex*.<sup>3</sup>

The laws are general precepts that a competent authority may apply to particular cases. In applying them, the authority pays attention to the letter of the laws rather than to their spirit. If the laws are wrong, they should be changed, but it is not for the judge to do so. A legal system, therefore, involves a certain fixing and objectification of social norms and ethical principles, and a certain distancing of the judge, who applies the laws, from the principles that the laws themselves were designed to meet.

To apply the laws, one needs some form of judicial procedure. Under Roman law, a judge would hear the evidence, determine how the law applied in this case, and finally either issue an instruction or pass sentence.

On a level above precepts and penalties, there are a number of related legal entities pertaining to rights, duties and obligations. The law not only recognizes but also conditions and creates rights, such as one's ownership of something. The fact that one is *de facto* living in a house does not mean that it is *de iure* one's own house, or even that one has a right to be there. Under some circumstances, rights can be passed on, created by agreement, alienated or nullified by the State, and so on. Closely related to rights are the matters of validity and of a characteristic activity of legal systems that one might call "deeming." The law may determine that an agreement between two persons fails to be a contract in law, or that the relationship of a man and a woman falls short of marriage in law (in other words, that it is not *matrimonium iustum*). Hence the

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<sup>3</sup> Some definitions may be helpful here. A text is an oral or written statement that is fixed so that many persons may refer it over a prolonged period. A legal code (from *codex*, "book") is a written collection of laws that a legislator has promulgated as a whole. The laws it contains will usually have existed before it was prepared, but not necessarily so, and they may appear there in modified form. Codes are usually systematic collections, but not by definition. A (mere) compilation is a collection of already existing laws: the laws contained therein have the force of law insofar as they themselves have been promulgated, but the collection *per se* has no legal force.

law may deem that what seems to be an agreement is not an agreement, or that what seems to be a marriage is not a marriage.

It is not difficult to see in what sense the West's doctrine of divorce and remarriage is "legalistic." From this point of view, what Jesus stated was not a guiding principle but a rule that one must follow to the letter and on pain of excommunication. Those who break the rule by remarrying after divorce are not really married at all, for their supposed marriages are invalid.

*The origins of ecclesiastical marriage law*

At what point does the Church's teaching on marriage become law?

The origins of ecclesiastical law lie in the regime of excommunication and penance. The regime of the insular penitentials of the eighth century permitted the gradual development of a graded and measured system of penance, but the early Church reserved penance for very serious crimes such as heresy and murder. It was a second chance that one could take only once in one's lifetime. Penance took the form of public prayer and fasting for a period of several months or years. Those who were of an especially rigorist disposition maintained that there could be no second chance, and that excommunication should be final.

This regime seems already to have involved the essential components of a legal system, namely: laws, judges, judicial inquiries and punishments. This was probably not how the early Christians understood it. They were more interested in saving souls than in maintaining order or regulating and protecting rights. Moreover, penance was more a means of forgiveness than of punishment. Nevertheless, the parallel was there.

Cyprian of Carthage noted that some rigorist bishops in his province closed the door of penitence against adulterers and refused to receive them back into the Church.<sup>4</sup> This tells us that adultery had been added to the list of sins that justified excommunication by the mid third century. We do not know under what conditions adultery warranted penance or was considered by the rigorists to exclude the sinner permanently from the Church. It seems unlikely that even rigorists would have regarded a mere passing lapse so severely, or that an adulteress who had repented and been reconciled with her husband would have been excommunicated. As in the case of

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<sup>4</sup> Cyprian, *Epist.* 55 (*Ad Antonianum*), 21, CSEL 3.2, p. 638.

heresy, it was probably those who persisted in their sin whom the Church excluded from communion with the faithful.

Once adultery had become one of the serious crimes for which bishops, on behalf of the Christian community, might excommunicate sinners, the problem of divorce and remarriage must have become crucial. The teaching of Jesus suggested that remarriage after divorce (except perhaps in the case of a man who divorced his wife for adultery) was adultery. For this reason, bishops might excommunicate and subject to penance a person who had remarried after a divorce that was valid in civil law. Thus the Council of Elvira (ca. AD 300) determined that women who left their husbands and married again, even if their husbands were adulterers, were to be excommunicated. Similarly, women who knowingly married men who had divorced their wives without good cause were to be excommunicated.<sup>5</sup>

The Council of Elvira did not prohibit the remarriage of men who had divorced their wives for adultery, but in due course the rejection of the double standard became another crux. A woman whose husband was being unfaithful to her, for example, had no redress under civil law, but she could take the matter to her bishop. If the man persisted, the bishop could inquire into the matter and prosecute the man, and then pass, or at least threaten to pass, sentence of excommunication. That might not have helped his wife very much, but some recourse to law was better than none at all.

Constantine greatly enhanced the tendency of the Church to become like an empire and of her bishops to act like judges.

A constitution made by Constantine already presupposes the capacity of the Church to conduct *iudicia* (that is, binding judgments that are in accordance with general and determinate laws or principles and made after due inquiry). Many scholars have doubted that this constitution is authentic, but it is congruent with several other indications and scraps of evidence. Litigants may take their cases to an episcopal tribunal (*episcopale iudicium*) or even transfer them thence after a hearing before a secular tribunal has begun. Judgment will then be made in accordance with Christian law, and the secular judges must “remain silent” (*Cod. Theod.* 1.27.1). Reaffirming this in AD 333, Constantine added that a case must be referred

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<sup>5</sup> See canons 8–10, Hefele–Leclercq 1.1, pp. 226–27.

to an episcopal court even if only one of the litigants desires this and the other is unwilling, and even if the secular hearing is almost complete and the judge has begun to pass sentence (*Sirmond.* 1). The composition of these courts is not known.<sup>6</sup>

At this time, there was not much in the way of Christian law that would have been applicable to civil cases. It would be inappropriate to speak of canon law in the patristic period, for the law of the Church was not yet a distinct science with its own scholars. Moreover, the Roman Church did not possess a systematic compilation of laws until Gratian's *Decretum*, nor a true code until 1917. What served instead, as well as the Bible itself, was a gradually accumulating quantity of decisions by Popes and councils. (The opinions of authoritative doctors made up a secondary corpus whose function was similar to that of the writings and *dicta* of the Roman jurists.) We must presume that the law applied by the episcopal courts was Roman for the most part, and that when the bishops found Christian law to be applicable but incompatible with civil law, Christian law took precedence. It was not so much the law that differed as the judges. St Paul urged the faithful of Corinth to take their grievances to the "saints" for judgment, and not "to go to law before the unrighteous." Since Christians are to judge the angels, they are surely competent to judge in mundane cases (1 Cor. 6:1-7). Ambrosiaster, commenting on this text with contemporary Roman practice in mind, argued that "because law exists more fully in the Church, where the Lord of law is feared, [St Paul] says that it is better to prosecute a case before the ministers of God. For by virtue of the fear of God they can more easily pronounce a true sentence of law."<sup>7</sup> The judgments of episcopal courts were preferable because they conformed more closely with the will of God.

This regime must have done much to establish and to extend the institution of episcopal tribunals, but it did not last long.<sup>8</sup> A ruling by Gratian in AD 376 to the bishops of Gaul and Spain appears to limit the competence of ecclesiastical courts to minor offenses "pertaining to the observance of reli-

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<sup>6</sup> *Cod. Theod.* 16.2.23 (AD 376) distinguishes between secular tribunals and "synods of the diocese." According to the *interpretatio*, the ecclesiastical tribunal envisaged here is a synod of diocesan priests convoked by their bishop, but Gaudemet argues that the synod in question was probably provincial: see *L'Église dans l'Empire romain* (1958), p. 234.

<sup>7</sup> *Ad Corinthios prima* 6:1, *CSEL* 81.2, p. 59.

<sup>8</sup> See J. Gaudemet, *L'Église dans l'Empire romain* (1958), pp. 233-37.

gion" (*Cod. Theod.* 16.2.23). In AD 399, Honorius, in the West, ruled that while religious cases should go before the bishops, other matters were to be dealt with according to Roman law (and, we must presume, before secular judges).<sup>9</sup> Honorius ruled elsewhere that bishops could arbitrate if both parties agreed to it,<sup>10</sup> but this was only a special application of a common right whereby any citizen could arbitrate provided that both disputing parties made a mutual promise (*compromissum*) to abide by his decision. Valentinian confirmed these rulings in AD 452, stating that any case between clerics or between laymen could be dealt with by a bishop if both parties agreed to this (in other words, a bishop could arbitrate), but that otherwise bishops were only competent in religious matters.<sup>11</sup>

What became of marital litigation in the course of these developments is largely a matter for conjecture. Constantine's regime must have at least confirmed the principle that there is an ecclesiastical law of marriage and an episcopal competence to apply it. Bishops would have become very aware of the coexistence of two conflicting legal systems, one secular and the other religious. By the fifth century, a dual regime had been established. On the one hand, judges dealt with secular matters according to civil law, using secular sanctions to enforce their decisions. On the other hand, bishops dealt with religious matters according to ecclesiastical law. No doubt they relied for the most part on the respect due to their station, but they were ready to threaten or apply the sanction of excommunication and public penance when this was appropriate. Marriage must have been subject to both regimes. It is not likely that ecclesiastical law could affect the civil consequences of marriage (for example regarding the rights of inheritance pertaining to the sons of a remarried divorcee).

The ascendancy of the Church as a legal authority provided fertile soil for the strict marital regime of the West that developed during the late fourth and early fifth centuries.

The interpretation of Jesus' prohibition of remarriage that eventually prevailed in the West was not an inevitable deduction from Jesus' teachings. The Fathers could, in good faith,

<sup>9</sup> *Cod. Theod.* 16.11.1.

<sup>10</sup> *Cod. Theod.* 1.27.2 (AD 408). Cf. the similar ruling by Arcadius in the East, *CJ* 1.4.7 (AD 398).

<sup>11</sup> *Nov. Val.* 35, pr. (AD 452). Gaudemet (*L'Église dans l'Empire romain*, pp. 236–37) is surely incorrect in affirming that this novel precludes arbitration by bishops in civil cases.

have treated Jesus' prohibition of divorce as they treated his prohibition of oaths: namely (if I may put this bluntly), as an impractical ideal. Moreover, one does not always prohibit by law what one admits to be morally wrong. For example, few societies have laws against telling lies. The regime was partly a consequence of a certain strictness as far as sexual and marital matters were concerned (what Jerome called "the severity of the Gospel"). By applying the prohibition of remarriage strictly, the Latin Fathers made Jesus' teaching into a law antithetical to that of Rome. But there is one aspect of the West's "legalistic" attitude to remarriage that we have not yet considered in this chapter: namely, the doctrine that remarriage after divorce is not only worthy of penance but invalid.

What is crucial here is not whether persons who remarried were excommunicated, but rather what they had to do to satisfy for their crime and to be taken back into the Church. According to what was to become the normative position of the Western Church, the penitent has at least to abstain permanently from sexual relations with the new partner. The putative second marriage is invalid as long as both partners in the first marriage survive, and sexual relations within it are therefore adulterous. From this point of view, penance looks more like a legal sanction than a means of atonement. Since both Jerome and Augustine assumed that this regime was what the Catholic faith required,<sup>12</sup> we can be sure that it was in place in some Western provinces or dioceses by the late fourth century, but there is no firm evidence that the regime existed before this time. Indeed, Giovanni Cereti argues that while the Church during the early patristic period may have excommunicated and subjected to penance persons who had remarried after illicit divorce, satisfaction did not originally require, as it did in the West in due course, that the penitent should renounce the new partner at least to the extent of permanently abstaining from sexual relations with her or him.<sup>13</sup> One may interpret the eighth canon of the Council of Nicaea (AD 325) in a manner consistent with Cereti's thesis. This canon determined that certain rigorist clerics were to be admitted to the Catholic Church provided that they remained in communion

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<sup>12</sup> See Jerome, *Epist.* 55, 5(4), *CSEL* 54, p. 494; and Augustine, *De adulterinis coniugiis*, II.15–16, *CSEL* 41, pp. 400–02.

<sup>13</sup> G. Cereti, *Divorzio, nuove nozze e penitenza nella Chiesa primitiva* (1977), pp. 270–354.



with those who had either remarried (*digamoi*) or lapsed under persecution but who had since done penance.<sup>14</sup> Cereti argues that remarried divorcees were included among the *digamoi*, and that it was as remarried persons that they were to be received back into communion with the faithful after penance.

If Cereti's thesis is correct, the position of the *Excerptiones Egberti*, an episcopal handbook of canons compiled in England around 1000 AD, was not so much an aberration as a survival of the old regime.<sup>15</sup> Here we find the canon from the Council of Carthage prohibiting remarriage, and immediately after it the following dictum, which is ascribed to Augustine: "If a woman has committed fornication, her husband is to leave her, but he is not to marry another as long as she lives."<sup>16</sup> Augustine may not have said this in so many words, but it was certainly his opinion. The next canon says that a man whose wife has left him and refuses to go back to him may remarry after five or seven years with the consent of a bishop if he is unable to remain continent. He should then do penance for at least another three years after remarrying, and perhaps even for the rest of his life, since "in the Lord's judgment" his second marriage makes him an adulterer.<sup>17</sup>

Clearly, this was a matter of concession and toleration rather than outright permission. The canons concede remarriage because the man was unable to remain continent.<sup>18</sup> He required the consent of a bishop, and he had to do penance for at least three years. The canon regards the second marriage as adultery, since this is what Jesus taught, but it does not consider the marriage to be invalid.

The doctrine that remarriage is invalid under all circumstances

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<sup>14</sup> *Decrees of the Ecumenical Councils*, ed. N. P. Tanner (1990), vol. 1, p. 9 (or Hefele-Leclercq, vol. I.1, p. 576). The rigorists, who are called Cathars, were probably Novatianists.

<sup>15</sup> On this source, see R. A. Aronstam, "The Latin Canonical Tradition in Late Anglo-Saxon England: the *Excerptiones Egberti*" (diss., 1974).

<sup>16</sup> *Excerptiones Egberti* 107, ed. Aronstam, *ibid.*, p. 96.

<sup>17</sup> *Excerptiones Egberti* 108, ed. Aronstam, *ibid.*, p. 96: "Si mulier discesserit a viro suo, despiciens eum, nolens revertere et reconciliari viro, post v vel vii annos cum consensu episcopi ipse aliam accipiat uxorem, si continens esse non poterit, et penitet iii annos vel etiam quamdiu vixerit quia iuxta sententiam Domini mechus comprobatur." Cf. *Confessionale Pseudo-Egberti* 26 (ed. Wasserschleben, *Die Bussordnungen* 26, p. 311) and Theodore's *Penitential*, II.12.20 (ed. Finsterwalder, p. 328, or Haddan and Stubbs, vol. 3, p. 200): if a woman leaves her husband and refuses to be reunited with him, the man may remarry after five years with the permission of a bishop.

<sup>18</sup> Cf. 1 Cor. 7:6.

as long as both original partners are alive goes along with the idea of the marriage bond. The Roman law of the Christian emperors knew nothing of either the doctrine or the idea, and it is unlikely that they found themselves in conflict with the Church on this point. I suggest that the doctrine and the idea were a Western development of the late fourth and early fifth centuries. In effect, the Latin Church had appropriated the notion of *matrimonium iustum* and the right to determine its conditions under divine law. This presupposed a certain maturity and self-reliance on the part of the Church as regards discipline and organization.

The very notion of the divine law of marriage implies a comparison as well as a contrast, and the marital regime of the Western tradition was partly a rejection and partly an adoption of elements of Roman law. The relationship between divine and human law was more complicated than one might at first suppose. As we have seen in the previous chapter, Leo rejected the Roman laws that permitted the spouse of someone held captive to remarry, but he based his argument on the Roman law of *postliminium*. Since he tended to regard the marital relationship itself as a kind of ownership, and thus as a matter of right, he reasoned that the returning captive had the right to recover his spouse just as he had the right to recover his land and slaves.<sup>19</sup> Again, Leo adopted the Roman principle that a marriage between a free person and a slave was invalid, but he tried to ground this in theology.<sup>20</sup>

We should be clear about what this assumption of legal authority over marriage entailed; or rather, what it did not entail. Canon law in the Roman tradition makes an important distinction between ecclesiastical law and divine law. The Church is considered able to interpret the divine law (whether natural or positive) authoritatively and infallibly. She cannot alter the divine law, but she can add laws to it and remove them, as she has done in the case of certain marital impediments.<sup>21</sup> (The divine law is usually assumed to be unchanging.) From this point of view, not all ecclesiastical rules are divine rules. During the patristic and early medieval periods, on the con-

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<sup>19</sup> See above, pp. 136–37.

<sup>20</sup> See below, pp. 162–68.

<sup>21</sup> According to RC doctrine, the Church always has the power to dispense from purely ecclesiastical impediments, but only in certain exceptional cases from impediments of the divine law. See A. H. van Vliet and C. G. Breed, *Marriage and Canon Law* (1964), qq. 80–81 (pp. 33–34).

trary, the distinction between divine and ecclesiastical law was less clear. If it was recognized at all, it was not systematically applied. Indeed, the tradition of the Church's law, like the liturgy, was something to which a theologian might appeal as an objective source of divine truth. Ambrose, for example, argues that *because* the law of the Church prohibits marriage between a Christian and an infidel, such marriages are not joined by God and must be dissoluble (since man *may* separate a marriage that God has *not* joined).<sup>22</sup> Bishops tried to use their authority to make people conform as much as possible with what they believed to be the will of God.

*The Church's view of civil marriage law*

The Latin Fathers regarded the Roman laws permitting divorce and remarriage, even when they came from Christian emperors, as human and not divine. For the most part, Latin speaking Christians in Roman society wished to introduce the City of God as a society within or above the City of Man, which had its own, civil law. They did not feel called radically to reform the latter, nor to abolish the distinction between the two orders. No Roman citizen could fail to have some respect for the ancient legal tradition, and the civil law, for all its imperfections, provided the basis for a civilized society. Perhaps it also provided a useful background against which the divine law of marriage stood out clearly. The distinction between the divine and human laws of marriage may have dissipated rather than focused the Latin Fathers' opposition to the civil law of divorce. It was not necessary to protest that the law should be changed, for it was, after all, only the civil law, and it would soon pass away. We need not be surprised that the Latin Fathers rarely protested against the Roman law of divorce. They only needed to point out that the law to which they adhered was superior.

Matters may have looked different from the special perspective of the North African Church. The Council of Carthage in AD 407 not only forbade divorce and remarriage on pain of excommunication but also expressed the wish that this rule should be adopted as secular law. Augustine would have been present at the council as Bishop of Hippo. The council decreed that:

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<sup>22</sup> Ambrose, *Exposito evangelii Lucae* VIII.2, CSEL 32.4, p. 392: "... ostendit [Apostolus] non a Deo omne coniugium; neque enim Christianae gentilibus Dei iudicio copulantur, cum lex prohibeat." Ambrose has in mind 1 Cor. 7:15.

In accordance with evangelical and apostolic discipline, neither a man dismissed by his wife nor a woman dismissed by her husband may marry another. Rather, they should remain as they are or be reconciled to one another. Those who condemn this law should be subjected to penitence.<sup>23</sup>

To this decree the bishops appended the clause: "In qua causa legem imperialem petendam promulgari." In other words, they requested that the prohibition of remarriage after divorce, which they believed to belong to divine law, should be enforced by the civil law. The State (I presume) would have then imposed civil sanctions in addition to the ecclesiastical sanction of penance. This ambition was unusual, and it did not materialize.

The context in which the distinction between the *lex divina* and the *lex humana* of marriage arose was one characteristic of the patristic period. A different situation prevailed in ninth century Francia. On the one hand, Christians no longer needed to set Christianity apart from other traditions and faiths. On the other hands, certain aspects of Charlemagne's administration (for example the *missi dominici*: royal agents sent out in pairs, each consisting of one spiritual and one secular lord) suggest that Church and State were supposed to act in tandem. The records of the numerous cases of marital litigation with which Hincmar of Reims became involved (especially the cases of Lothar II and Theutberga and of Stephen of Auvergne and Count Regimund's daughter) show that some aspects of marriage were subject to dual jurisdiction. Whether a man could dismiss his wife and remarry was an issue that he might have to settle before both episcopal and secular tribunals, with each order respecting the competence of the other. It is not clear now either precisely what protocol was involved or how one might have decided which aspects were subject to which competence (and it may not have been clear then). As far as we know, neither arm was subordinate to the other. The influence of the Church was such that a nobleman could not afford to disregard ecclesiastical judgments. A further complication arose when some of these cases were referred to the Papacy, for the Pope would then insist that his word was final, so that the case should not be referred again to any inferior court.<sup>24</sup>

<sup>23</sup> Dionysius Exiguus, *Registrum Ecclesiae Carthaginensis* 102, in Munier (ed.), *Concilia Africae*, CCL 149, p. 218 (or PL 67:215-16 or Hefele-Leclercq 2.1, p. 158). In the Hispana, the decree is attributed to the Council of Milevis (AD 416), canon 17: see CCL 149, pp. 325 and 366.

<sup>24</sup> See J. McNamara and S. F. Wemple, "Marriage and Divorce in the

In an important study of competence over matrimonial cases, Pierre Daudet has argued that the Church was extending its competence over marriage during this era.<sup>25</sup> In due course, in the high Middle Ages, the Church's competence over marriage would become total, even to the extent that the decisions of the episcopal courts affected the secular consequences of marriage.<sup>26</sup> It was then for the Church to decide whether any particular marriage was valid or not. Subsequently a division appeared again between secular and ecclesiastical competence, and the modern distinction between secular and religious marriage arose.

Most scholars in the field have accepted Daudet's thesis in broad outline,<sup>27</sup> but it should be noted that in the cases in which Hincmar was concerned, lay and ecclesiastical authorities applied the same rules. Hincmar said that a marriage could not be valid if it was found to be illegal "according to Christian laws; that is, secular and ecclesiastical laws."<sup>28</sup> The question of any discrepancy between the precepts of human and of divine law hardly arose. Hincmar assumed that there should be agreement between the civil and ecclesiastical authorities, and that "Christian" rules should always be applied. In deciding whether a marriage was valid, it was ultimately God's law alone that counted. Hincmar said that a marriage that did not contain the sacrament of Christ and the Church to which Paul referred in Ephesians was "neither a mystical nor a legal marriage in the eyes of God."<sup>29</sup> The marriage law that the State now applied was what the Latin Fathers had declared to be the *lex divina*.

Under the theocratic regime of the Carolingians, when the decrees of councils were inscribed in the royal capitularies,

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Frankish Kingdom," in *Women in Medieval Society*, ed. S. M. Stuard (1976), pp. 109–13, *passim*.

<sup>25</sup> P. Daudet, *Études sur l'histoire de la juridiction matrimoniale. Les origines carolingiennes de la compétence exclusive de l'église* (1933).

<sup>26</sup> See P. Daudet, *Études sur l'histoire de la juridiction matrimoniale. L'établissement de la compétence de l'église en matière de divorce et de consanguinité (France Xe-XIIème siècle)* (1941).

<sup>27</sup> But see Jean Devisse, *Hincmar*, vol. 1 (1975), pp. 421–28 (with a critique of Daudet on pp. 425 ff.).

<sup>28</sup> Hincmar, *De divortio Lotharii et Tetbergae*, PL 125:730C: "si secundum leges Christianas, forenses scilicet atque ecclesiasticas, inventum fuerit quod illa conjunctio legalis non fuerit. . . ."

<sup>29</sup> *Epist.* 136 (*De nuptiis Stephani et filiae Regimundi comitis*), *MGH Epist.* 8 (*Epist.*, *Karolini Aevi* 6), p. 95, lines 27–28: "Quapropter tales non mysticae neque legales in oculis Dei sunt nuptiae."

civil and ecclesiastical jurisdictions remained distinct, but the notion of civil law *versus* ecclesiastical law no longer applied.<sup>30</sup> As agents of reform, Pepin and Charlemagne were concerned more with imposing Christian principles than with applying Salic or Roman law. The formative opposition here was not that between the human law of the State and the divine law of the Church, but that between tradition and compromise on the one hand and reform on the other: that is, on the one hand the accommodation of Christian ideals to merely secular law and custom and to human interests and practicalities, and on the other hand the rigorist attempt to ensure that Romano-Christian laws were applied to the letter. Pepin and Charlemagne, under the influence of men like Boniface, were the instigators of this movement of reform.

As we have noted, the Council of Carthage in AD 407 not only prohibited the remarriage of divorcees on pain of excommunication but also asked that this prohibition should be promulgated by an imperial decree. Their desire was not fulfilled at that time, and the divergence between civil and religious law on the matter of divorce remained large. It was fulfilled, however, under Charlemagne.

Pope Zacharias had already quoted the decree of Carthage in a rescript to Pepin *circa* AD 747.<sup>31</sup> Charlemagne included a different version of it both in his *Admonitio generalis* of AD 789 and in his *Capitulare missorum* of AD 802.<sup>32</sup> The source of this version was the Dionysio-Hadriana: that is, the edition of Dionysius Exiguus's collection that Pope Hadrian had given to Charlemagne in AD 774. By AD 802, Charlemagne had become Emperor. In this way, the wish of the Carthaginian bishops that the rule should be promulgated by an imperial law was granted at last. The *lex divina*, having arisen in contrast with the *lex humana*, had now overcome it, although one may doubt that this had much effect on the mores of the nobility, let alone upon those of the ordinary people.

While Hincmar accepted the competence of both ecclesiastical and secular courts, he considered that in the last analysis

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<sup>30</sup> See Devisse, p. 427.

<sup>31</sup> *MGH Epist.* 3, p. 483 (cap. 11). Cf. Zacharias's letter to Boniface about the rescript, in which he says that he has written "simul etiam et pro illicita copula, qualiter sese debeant custodire iuxta ritum christianae religionis et sacrorum canonum instituta" (*ibid.*, p. 349).

<sup>32</sup> *Admonitio generalis* 43, *MGH Capit.* 1, p. 56; *Capitulare missorum item speciale*, *ibid.*, p. 103.

it was God's law that ought to prevail in all questions pertaining to the validity and dissolution of marriage:

Let [those who err in such matters] defend themselves however much they wish . . ., whether by civil laws [*leges mundanae*], if there are any, or by human customs [i.e., by written laws if any are applicable, or otherwise by customary laws]. And yet they should know, if they are Christians, that in the day of judgment they are to be judged by divine and apostolic laws, not by Roman or Salic or Burgundian laws. In a Christian kingdom, however, even the civil laws [*leges publicae*] must be Christian: that is, in agreement and consonant with Christianity.<sup>33</sup>

Hincmar respects the secular courts, but only because he presupposes that the secular regime and the civil law are Christian. More precisely, as Hincmar notes, secular law must be *consonant* with divine law, for the former must contain much that is arbitrary and neutral with respect to the law of God. The Church's prohibition of remarriage is not simply one law among others, but rather is the true law, the law that will stand the eschatological test of time.

Insofar as the distinction between human and divine marriage law endured, it acquired a new significance in the Carolingian world. For while there were many legal systems (Frankish, Bavarian, Visigothic, Roman and so on), there was only one law of God. Human law was arbitrary and ephemeral while God's law was true and eternal. God's laws, and not human laws, determined who was truly married.

This sensibility manifests itself in a ruling made at the Council of Tribur in AD 895. Suppose a Frankish man marries a Saxon or Bavarian woman. The discrepancy between the laws to which husband and wife are respectively subject is not detrimental to the validity of their marriage. Nor may the man later dismiss her and remarry on the grounds that he did not betroth, endow and accept the woman by his own, Frankish laws. If he does so, he has transgressed the only law that really matters in this case, namely that of the Gospel, and he must leave the second woman and return to the first.<sup>34</sup>

<sup>33</sup> *De divortio*, PL 125:658B.

<sup>34</sup> *Conc. Triburiense* (AD 895) 39, and *Conc. Tribur. iudicia* 4, MGH *Capit.* 2, pp. 207 and 235–36.

## CHAPTER SEVEN

### THE IMPEDIMENT OF INEQUALITY

We have seen in chapters 5 and 6 how the notion of the *lex divina* of marriage arose in the Western Church during the fourth and fifth centuries. The Church ruled that what human law permitted was not always permitted under divine law, and that what was valid under human law might be invalid under divine law. All the examples we considered pertained directly or indirectly to divorce and remarriage.

Did the Church ever rule that what human law forbade or found to be invalid was permitted or valid under divine law? Bishops sometimes judged that the conditions for marriage required in civil law were insufficient, but did they ever judge that they were unnecessary? There is one area in which one might expect the Church to do this: namely, in the case of the marriage of servile persons. Surely, if all persons have been created in the image and likeness of the same God, and if all Christians are members of the same body of Christ, then one's social status cannot affect the validity of one's marriage in the Church. That is how the matter seems to us, and it was how it seemed to churchmen in the high Middle Ages; but was it how it seemed from the perspective of the Fathers?

As we have seen, in Roman law there was no *conubium* between two slaves nor between a free person and a slave.<sup>1</sup> The barbarian as well as the Roman codes of the Germanic kingdoms presupposed that a sexual alliance between two slaves or between a free and a servile person could not amount to marriage<sup>2</sup> Such alliances were not necessarily forbidden. They might have the intrinsic characteristics of marriage, but in law they could only amount to concubinage or *contubernium*, and

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<sup>1</sup> See S. Treggiari, *Roman Marriage* (1991), pp. 52–54.

<sup>2</sup> See C. Verlinden, "Le 'mariage' des esclaves," in *Il matrimonio nella società altomedievale* (1977), vol. 2, 569–593. The most explicit statement of the principle regarding "mixed" marriages is that of *Lex Romana Burgundionum* 37.5 (p. 156): "Inter ingenuum vero et ancillam, sive servum et ingenuam, sicut consensus contubenia facere possunt, ita nuptiae non vocantur, et qui ex his nati fuerint, deteriore lineam secuti dominis adquiruntur." The statement is based on Paul, *Sententiae* 2.19.6: "Inter servos et liberos matrimonium contrahi non potest, contubernium potest."



not to valid marriage (*matrimonium iustum*). If a free person married someone whom he believed to be free, but the latter turned out to be servile, then the alliance need not be dissolved, but it was not strictly a marriage from the legal point of view.<sup>3</sup> And because a slave was owned by a free person, he had no property that was *de iure* his own. For this reason, the children of two slaves belonged to their parents' masters and not to their parents themselves. If one parent was free and the other was a slave, then in Roman law the children took the status of their mother, while in Germanic law they might belong to the master of whichever parent was servile.<sup>4</sup>

One might well expect that in this regard, if in no other, the Church would have ruled that alliances which could not amount to true marriage in civil law did in fact amount to true marriage in the eyes of God.<sup>5</sup> St Paul tells the Galatians that through baptism they have put on Christ, and that there can be neither slave nor free because all are one in Christ (Gal. 3:28). It is not surprising to find authors in the high Middle Ages citing Paul's affirmation in discussions of the marriage of slaves. The canonist Gratian cites it in his introduction to the question whether a free woman who has married a slave in the belief that he is also free may dismiss him. Gratian deduces from Paul's dictum that "it is not commanded that the freewoman should marry the freeman, the bondswoman the slave; rather each may marry whomsoever she wills, provided only that it is in the Lord."<sup>6</sup> Similarly, Pope Adrian IV argues that since there is neither bond nor free in Christ, and since the slave is not denied the sacraments of the Church, so also slaves should not in any way be prevented from marrying one another. (The consent of their masters, in other words, is not a necessary condition for the validity of their marriages.)<sup>7</sup> Bonaventure, referring to the new right (*ius novum*) introduced by Adrian, argues that a slave should be free to marry, even

<sup>3</sup> See *Nov. Iust.* 22.10 and 22.17, pr.

<sup>4</sup> See *Cod.Theod.* 4.8.7, and cf. *Lex Romanum Burgundionum* 37.5, which probably reflects Germanic law.

<sup>5</sup> On attitudes to the marriage of servile persons in the high Middle Ages, see M. M. Sheehan, "Theory and Practice: marriage of the unfree and the poor in medieval society," *Mediaeval Studies* 50 (1988), 457-87.

<sup>6</sup> C.29 q.2, dictum ante C.1 (1092).

<sup>7</sup> X 4.9.1 (2:691-62). See P. Landau, "Hadrians IV. Decretale *Dignum est* (X 4.9.1.) und die Eheschließung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts," *Studia Gratiana* 12 (1967), 511-53.

against his master's wishes, since there is neither bond nor free in Christ Jesus. If the Church excludes no Christian from sacraments, how can there be a distinction regarding matrimony, since it is one of the sacraments?<sup>8</sup> Such are the kinds of opinion that we have been conditioned to expect from Christians, but matters did not necessarily appear in the same light in the early Church.

It does not necessarily follow from Galatians 3:28 that marriages between slaves or between free persons and slaves are valid. Paul said in the same verse that there was neither male nor female in Christ, yet this equality did not preclude marriage, and there could be no marriage without the difference between male and female. Moreover, Paul did not condemn slavery. What precisely oneness in Christ meant to Paul is hard to say, but he must have had in mind an equality of some kind within the Christian community. Slaves were not equal in every respect to free persons even in the Church (and women were not equal in every respect to men), but at least slaves were citizens of this community, while they were not citizens in the world outside. Paul did not seek to revolutionize the latter order, for he expected it soon to pass away.

The supposition that Christians must always have recognized the validity of the marriages of slaves is partly based on a false premise: namely, that Christians always considered marriage to be a partnership or *societas* that belonged to the religious rather than to the secular order. In the early Church, I take it, civil criteria determined who was married to whom. By the fifth century, Western Christians supposed that marriage was subject above all to the *lex divina*, but even then, ecclesiastical law and competence regarding marriage were limited and co-existed with the law of the State. The Church was still in no position to declare that a marriage between a free person and a slave was strictly *matrimonium iustum*, for no judgment of the Church would affect the most important civil consequences of inequality in marriage: namely, the illegitimacy of the offspring. Even if the Church were to rule that a servile marriage was valid, civil validity would be one thing and religious validity another, so that the Church would not oppose the civil law. Moreover, such a marriage would probably appear even to Christians as second-rate and suspect at best. We should not

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<sup>8</sup> IV *Sent.* 36.1.1, arg. a; *ibid.*, resp.

expect to find that the early Church always affirmed that free persons were able to marry slaves. If it turns out that the early Church accepted the secular rules for *conubium* in this respect, we may wonder how matters changed when the Fathers began to reason that marriage came under God's law, and not under human law.

Here an interesting question arises. The Church prescribed rules for married persons, but who or what determined who was truly married? For example, when the Church forbade married persons to remarry, to what extent did the Church also determine which persons were truly married, and thus subject to this law? In ruling that some marriages were invalid in the Church even though they were valid in civil law (namely, the marriages of divorcees), the Church had made a major step toward determining the conditions for valid marriage.

For what remains of this discussion, I shall have to rely on a few very well known scraps of evidence.

The attitude of the early Church to unequal marriage was not uniform. In a ferocious attack on Callistus I, Bishop of Rome from 217–222, Hippolytus accused the Pope of permitting young women of high social standing, who burned with passion and did not wish to lose their rank by marrying in accordance with the law, to form alliances with whomever they chose, whether free or servile, and to regard these partners as their husbands.<sup>9</sup> If the Pope had any theological rationale for acting in this way, we are told nothing about it. In any case, as Gaudemet has pointed out, there were probably pressing pastoral motives behind the policy.<sup>10</sup>

Legislation introduced by Augustus (contained in the *lex Iulia et Papia Poppaea*) had determined that the descendants of senators for three generations in the male line<sup>11</sup> could marry neither freed persons nor persons engaged in the theatre.<sup>12</sup> The sanction

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<sup>9</sup> Hippolytus, *Refutatio omnium haeresium*, IX.12.24–25, ed. Marcovich (*Patristische Texte und Studien* 25), pp. 355–56. For commentary on this text, see especially J. Gaudemet, "La décision de Callixte en matière de mariage," *Sociétés et mariage* (1980), 104–115; and also H. Crouzel, *L'Église primitive face au divorce* (1970), pp. 308 ff. For the interpretation that follows I am much indebted to Gaudemet.

<sup>10</sup> *Sociétés et mariage*, pp. 106–108.

<sup>11</sup> I.e. their sons and daughters and their grand-children and great-grand-children in the male line of descent.

<sup>12</sup> *Dig.* 23.2.44.pr. See Gaudemet, "Le mariage en droit romain," *Sociétés et mariage*, pp. 66–73.

against such marriages was probably nullity.<sup>13</sup> Other forms of unequal marriage may also have been forbidden, although the precise rules remain obscure. The laws merely tell us that to be legitimate, marriage had to be between persons of equal standing.<sup>14</sup> In the early third century, when the Church was a small and sometimes persecuted society whose members were still mainly drawn from the lower orders, it must have been difficult for young Christian women of patrician rank to find husbands of their own standing within the Church. If the Church was to insist on *matrimonium iustum*, a patrician woman might have had either to remain single or to lose her own status in order to enter into legitimate marriage with a Christian of lower rank. The young women to whom the text refers were anxious to avoid this. Callistus, if Hippolytus is to be believed, had relaxed the requirement by permitting Christian women to form alliances that in civil law fell short of *matrimonium iustum*.

The marriage of a patrician woman with a slave was a different matter, for in civil law there could be no valid marriage between a free person and a slave nor even between two slaves.<sup>15</sup> Be this as it may, Callistus seems to have permitted young patrician women, who could not find Christian partners of comparable standing, and who therefore could not marry legitimately within the Church, to form alliances with Christian men of lower rank or even with slaves, alliances that the civil law regarded as concubinage or *contubernium*. They were to regard their partners as their husbands. The civil consequences of marriage would not obtain in such cases, and the children would have been illegitimate (since that was a civil matter). Callistus must have intended the normal requirements of marriage in the Church (fidelity, permanence and so on) to apply as well to these alliances as to legitimate marriage. Moreover, while the evidence for the existence of a nuptial liturgy at this time is inconclusive, we must presume that these women got married in the same way as all Christians did, whatever this way may have been.

Even if one assumes that Hippolytus's report is accurate,

<sup>13</sup> Cf. *Dig.* 23.2.16.pr., 23.2.42.1, 24.1.3.1.

<sup>14</sup> See *Cod. Theod.* 3.7.3 (= *CJ* 5.4.22): the necessary conditions for validity are that the marriage is between persons of equal standing (*inter pares honestate personae*), that there is no legal impediment and that the necessary consents have been given.

<sup>15</sup> On concubinage between free women and their slaves, see Gaudemet, "La décision de Callixte," p. 111.

the significance of Callistus's action remains controvertible. Some scholars have seen in Callistus's policy a decisive break with Roman values. Johannes Quasten, for example, regards it as "one of the greatest achievements of Callistus's pontificate." He continues:

The Roman Empire placed an insurmountable barrier between slave and free, stringently forbidding any marriage between them. . . . It was an epoch-making advance when Callistus defied the popular prejudices of his day and granted ecclesiastical sanction to these unions for Christians. By giving her blessing in such cases, the Church broke down the barrier between the classes and treated their respective members as equals. She thus took a tremendous stride forward in the direction of the abolition of human bondage, and Callistus' startling innovation in the ancient marriage customs stands as a striking testimony to the social progress promoted by the Church in the Roman Empire.<sup>16</sup>

Callistus does seem to have made a bold decision and to have implied that a marriage which was illegitimate (in civil law) might nevertheless be valid (in the sight of God), but the step he made was in three respects rather less than Quasten suggests.

First, even if Callistus did make a decisive break with Roman tradition, there is no record that others took the same view or that the general policy of the Church shifted at this time. As we shall see, Pope Leo I, in the fifth century, affirmed that there could be no marriage between a free person and a slave. Second, the policy, as reported by Hippolytus, was not in outright opposition to the civil law. The Pope did not exactly permit what the civil law forbade. He did not and was hardly in a position to argue that the alliances in question were legitimate. Not until the fourth century do we find Christian authors appropriating the term *legitimum* to their own ends and making Christian rules, rather than civil ones, the criteria for legitimacy. Callistus did not, it seems, even affirm that the women were married. What he must have seemed to have done, from the perspective of his own time, was to have given the Church's blessing to concubinage. The interests of the Church and of the State in this matter were not the same, for where the former was concerned with fidelity, with permanence and with the behaviour of the spouses to each other and to their children, the latter was concerned with the legitimacy and rank

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<sup>16</sup> Johannes Quasten, *Patrology*, vol. 2: *The Ante-Nicene Literature after Irenaeus* (1962), pp. 206–7.

of the offspring. Third, it is likely that he made this concession in view of certain serious pastoral difficulties. There is no indication it sprang from any radically new thinking regarding either marriage or slavery.

Others considered that a marriage between unequals was not acceptable even from the Christian point of view. It is evident that Hippolytus found Callistus's policy to be scandalous. Ambrose of Milan (d. 397) argues that men will learn that they should not spurn marriage and form alliances with unequals (*impares*) if they are mindful that the children born of such alliances are not heirs. In this way they may be moved by considerations of heredity to seek a worthy marriage (*dignum matrimonium*) even if they are insufficiently moved by considerations of what is decent.<sup>17</sup> Ambrose said this with concubinage in mind, for in late Roman society it was customary for young men of high social standing to form monogamous and fairly stable alliances with women of inferior status. When the time came for a man to settle down and to produce heirs, he would dismiss his concubine (as did Augustine). Ambrose presupposed that a marriage that is true and worthy from a Christian point of view must be one whose offspring are legitimate heirs, and the latter was a matter determined by civil rules. The men at whom Ambrose aims his argument, who were more likely to be motivated by *hereditas* than *pudor*, shared the secular values of Roman society and saw marriage as the means to generate legitimate offspring. Ambrose baptized and did not reject the distinction between concubinage and marriage.

Pope Leo I, in a letter written to Rusticus, Bishop of Narbonne, in AD 458 or 459, reveals the same presuppositions. Here we find the Pope not only adopting the position of Roman law regarding the marriage of unequals, but even deducing it from theological premises.<sup>18</sup>

<sup>17</sup> *De Abraham* I.(3)19, CSEL 32.1.2, p. 515.

<sup>18</sup> *Epist.* 167, *inquisitio* 4, PL 54:1204B–1205A. Gratian quotes most of the text in C.32 q.2 c.12 (1:1123). Leo's ruling is strikingly similar to a spurious canon of the First Council of Nicaea preserved in Arabic: see *Eorumdem sanctorum patrum CCCXVIII sanctiones et decreta* (trans. Abraham Ecchellensis), ch. 4, in Mansi 2, col. 1037. The work is a spurious record of the decisions at Nicaea: see Hefele-Leclercq, vol. 1.1, p. 517. The canon states, first, that Christians may not marry bondsmen or bondswomen unless the slaves in question have first been manumitted. In the latter case, marriage should be contracted legally and dotation should take place, in accordance with the custom of the region. Second, no-one may marry a concubine unless the following conditions have been satisfied: that she

Rusticus had inquired about a certain priest or deacon who had given his daughter in marriage to a man who had had a concubine and had had children by her. From Leo's reply, it is clear that the concubine was a bondswoman. Was the man to be regarded as already married? The fact that the question arose at all shows that some were prepared to answer in the affirmative, but Leo argued that since the woman was a slave, she was not the man's wife but his concubine, and therefore presented no impediment to the man's marriage. The text needs to be considered in some detail.

"Not every woman," Leo's reply begins, "who is joined to a man is his wife, because not every son is his father's heir." In retrospect the reader may find here an echo of Genesis 21:10, a text cited in the course of Leo's reply, but in itself the statement accurately conveys something from Roman law. Not every union between a man and a woman constituted *matrimonium iustum*, for there was no *conubium* between a free person and a slave. An alliance between a man and a woman who was his slave could only amount to concubinage, and the offspring of concubinage were not legitimate. If a man had children by a concubine and then by a wife, only the children of the latter alliance had the advantages of legitimacy. Indeed, this was the main consequence and the chief index of the difference between concubinage and marriage (cf. *Dig.* 39.5.31, pr., *CJ* 5.27.10, pr., and *Nov.* 117.3).

Leo goes on to explain why the union in question is not marriage:

A matrimonial compact [*nuptiarum foedera*] is legitimate when it is between free persons [*ingenui*] who are of equal standing [*aequales*]. And this was instituted by the Lord, long before the beginning of Roman law. Therefore a wife is not the same as a concubine, just as a bondswoman is not the same as a freewoman.<sup>19</sup>

We cannot ascertain what kind of equality Leo has in mind when he says that marriage must be between equals. In any

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has been publicly set free; that a dowry has been publicly bestowed; and that the marriage has been contracted publicly and legally, in accordance with the customs of free people.

<sup>19</sup> I have translated the word *ingenua* by "free." It clearly does not mean "freeborn," for later in the text Leo states that before a bondswoman can marry, she must be *ingenua facta*. In classical Latin the word means "noble" and "freeborn" (as opposed to *liberta*, "freed"), but in early medieval Latin it can mean "freed," so that an *ingenuus* is a freedman. See Niermeyer's *Mediae Latinitatis Lexicon Minus* for examples.

case, his main concern here is with a case of extreme inequality: namely, that between a free person and a slave.

Roman law determines that there is no *conubium* with slaves, but God (according to Leo) determined this long before Roman law. When? Leo may be referring to the story of Hagar and Sarah, to which he refers next, but he bases his argument on the analogy posited in Ephesians 5:31–32 between marriage and Christ's union with the Church. This text in turn reveals the meaning and intent of Genesis 2:23–24. It was on the occasion when the latter dictum was spoken, therefore, that God first determined, albeit implicitly, that there is no *conubium* with a slave.

Leo continues:

It was for this reason that the Apostle, in order to show how such persons differ, put forward as evidence a text from Genesis [21:10] according to which it was said to Abraham: "Cast out this bondswoman and her son, for the son of a bondswoman shall not be heir with my son Isaac."

Leo cites this text not merely to remind Rusticus that Christian men should set aside their concubines and that not all sons are heirs. It comes from the story of Sarah and Hagar, and St Paul himself interprets this allegorically in Galations 4:24 ff. Hagar, as a bondswoman, stands for the Old Covenant and for the Jerusalem of this world. She bears children in slavery. Sarah stands for the Jerusalem that is supernal and free. She bears children in freedom, for they are the followers of Christ. In other words, she stands for the Church. Only marriage to a freewoman can represent Christ's union with the Church,<sup>20</sup> as Leo explains:

Since the nuptial compact [*societas nuptiarum*] was instituted from the beginning so that, besides the union of man and woman [*praeter sexuum coniunctionem*], it should contain a sacrament of Christ and the Church, there is no doubt that a woman in whom it is proved that there has been no nuptial mystery does not attain to matrimony.

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<sup>20</sup> A similar argument was used in the high Middle Ages to show that marriage cannot be coerced: see Hugh of St Victor, *De sacramentis* I.8.13, *PL* 176:315B and Thomas Aquinas, *IV Sent.* 29.1.3, *sed contra*. Thomas argues that coercion invalidates marriage because "marriage signifies the union of Christ to the Church, and this union is made through the liberty of love," an argument repeated by the canonist Juan de Torquemada in the 15th century: for the last, see J. T. Noonan, "Power to Choose," *Viator* 4 (1973), p. 434.



God instituted marriage in this way in Genesis 2:24. The phrases "a sacrament of Christ and the Church" (*Christi et Ecclesiae sacramentum*) and "nuptial mystery" (*nuptiale mysterium*) both evoke Ephesians 5:32, *sacramentum* and *mysterium* being the alternative Latin translations for the Greek word *mystêrion*. By the word *sacramentum*, Leo apparently means "sign" or "type." God instituted the *sacramentum* in the beginning, and Roman law, in respect of freedom in marriage, confirms what we might deduce from the Bible.

It seems to me unlikely that the phrase *sexuum coniunctio* denotes carnal union. Leo's point is surely that just as not every sexual alliance is *matrimonium iustum*, so not every sexual alliance contains the *sacramentum* of Christ and the Church. The ambiguity of the word *praeter*, however, which might mean either "in addition to" or "apart from," leaves room for doubt. Gaudemet sees here a reference to the Roman legal principle that agreement alone, without coitus, makes marriage.<sup>21</sup>

Leo concludes that the cleric in question need have no fear about giving his daughter to the man who has kept a bondswoman as his concubine. He has not given her to a married man. But Leo adds, "unless perchance it is known that the woman [i.e. the concubine] has been made free, legitimately endowed [*dotata legitime*] and honoured by public nuptials [*publicis nuptiis honestata*]." <sup>22</sup>

We should be careful not to read too much into this final clause. Leo does not affirm, as early medieval churchmen and some modern scholars have assumed, that *no* marriage is legitimate without dotation and public nuptials. There is no reason to suppose that he strayed so far from Roman consensualism. The case to which he refers is a special one: namely, that of a freeman's marriage to a woman who has been his servile concubine. Dotation was an accepted way of legitimizing an alliance with a concubine (cf. *CJ* 5.27.10, pr. and *Nov.* 117.3), for in such cases one needed clear evidence that the concubine had become a free wife and that the man's "affection" or attitude towards the woman had changed. Nevertheless, Leo is much stricter about the need for such formalities than Justinian will be.

<sup>21</sup> "Les origines historiques de la faculté de rompre le mariage non consommé," *Sociétés et mariage*, p. 211.

<sup>22</sup> The phrase *dotata legitime* might be translated "bestowed with a dowry in accordance with the civil law." It probably denotes not only endowment but also documentation.

Leo refers to Roman law. André Lemaire, in an important article published in 1929, suggests that Leo's ruling owes something to the constitution of Theodosius and Valentinian of AD 428, which had been interpreted as requiring dotal documentation between persons who were not of comparable rank (*impares honestate*). The same constitution contains a reference to marriage ceremonies.<sup>23</sup> Lemaire also suggests tentatively that, since Leo's letter is dated 458–59, the expression *dotata legitime* may refer to Majorian's novel of AD 458, which had ruled that without endowment (*sine dote*), a sexual alliance could not be recognized as matrimony, nor its issue as legitimate.<sup>24</sup>

These suggestions were repeated by Anné in 1935.<sup>25</sup> Gaudemet expressed some doubts about the suggested connection with Majorian's constitution in an article first published in 1953,<sup>26</sup> but this part of Lemaire's suggestion seems to have become accepted as an established fact. According to both Diane Owen Hughes (in 1978) and Donnchadh Ó Corráin (in 1985), Leo's letter conveyed Majorian's ruling and thus transmitted it to the Germanic and canonical traditions.<sup>27</sup>

There may well be some connection with the constitution of Theodosius and Valentinian, although it is difficult to determine its precise nature. It should be noted, however, that Leo does not say that all marriages that are not *inter aequales* must be endowed, and it is far from clear that this is what Theodosius means. What Leo says is simply that such marriages are not legitimate. There is no solid evidence that Majorian's constitution influenced Leo's rescript. As Gaudemet has pointed out, we cannot ascertain which text came first. Moreover, as we have noted, Leo does not affirm that dotation is necessary for the validity of every marriage, but only that it is necessary when a man frees and marries his concubine. Leo's requirements, unlike Majorian's, are not much out of step with Roman legal tradition.

The answers Leo gives to two further questions merely under-

<sup>23</sup> *Cod. Theod.* 3.7.3 (= *CJ* 5.4.22). Cf. *CJ* 5.4.23.7.

<sup>24</sup> Majorian, *Nov.* 6.9. André Lemaire, "Origine de la règle *Nullum sine dote fiat coniugium*," in *Mélanges Paul Fournier* (1929), p. 417. Severus probably abrogated the rule in AD 463: see Severus, *Nov.* 1.

<sup>25</sup> "La conclusion du mariage," *Ephemerides Theologicae Lovanienses* 12 (1935), p. 523.

<sup>26</sup> "Droit romain et principes canoniques," *Sociétés et mariage*, p. 128.

<sup>27</sup> D. O. Hughes, "From Brideprice to Dowry," *Journal of Family History* 3 (1978), p. 265. D. Ó Corráin, "Marriage in Early Ireland," in *Marriage in Ireland*, ed. A. Cosgrove (1985), p. 14.

line what he has already established.<sup>28</sup> First, there is no blame if a man marries his daughter to a someone who already has a woman, as long as the latter is not "in matrimony" (in other words, as long as she is only a concubine). Second, because "a wife is one thing and a concubine another," to set aside a bondswoman (*ancilla*) and to take a woman whose free birth (*ingenuitas*) is assured is not a "duplication of matrimony" but rather an "increase in honour [*honestas*]." Leo envisages two routes from concubinage to marriage: the man can either free the woman and then marry her; or he can set her aside and marry a free woman. Both courses of action are honourable in his view.

Leo's policy did not directly oppose that of Callistus, for it addressed an entirely different problem. Where Callistus dealt with the case of patrician women marrying beneath their class, Leo dealt with alliances between freemen and their servile concubines. It is arguable that there was an opposition of principle. First, Leo could not accept that the Church could permit a sexual alliance between two partners, one of whom was free while the other was not. Callistus (if one may trust Hippolytus) was prepared to accept this. Second, Leo, in this case at least, did not distinguish between the criteria for *iustum matrimonium* in Roman law and the criteria for true marriage in God's law. Callistus apparently did. Once again, a note of caution is required. Where Leo is concerned with matters of principle, Callistus was probably mainly concerned with a pressing pastoral problem, and his policy may have been no more than a matter of concession.

It is not possible on the basis of these two texts alone (from Hippolytus and Leo) to generalize regarding the Church's attitude to marriage between free and servile persons during the patristic and early medieval periods. It is clear that there was often, until at least the early fifth century, a degree of toleration within the Church for concubines and for men who had concubines. If fidelity and monogamy were observed, such persons were usually not precluded from baptism and eucharist, although manumission followed by legitimate marriage was the preferred course.<sup>29</sup> Gaudemet suggests that Leo's reply, dated

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<sup>28</sup> *Inquisitiones* 5-6, *PL* 54:1205B.

<sup>29</sup> See J. Gaudemet, "La décision de Callixte en matière de mariage," *Sociétés et mariage* (1980), pp. 112-15; and H. Crouzel, *L'Eglise primitive face au divorce* (1970), pp. 306-12.

458 or 459, was an index of historical changes pertaining both to the development of ecclesiastical law and to the Pope's authority and power vis-à-vis the State.<sup>30</sup> The contrast between the respective situations of Callistus, in the early third century, and Leo, in the mid fifth century, is clear enough. Ambrose, however, in a passage from the *De Abraham* that has been discussed above (and that Gaudemet cites<sup>31</sup>), presupposed that a Christian man could not contract a true or worthy marriage with a servile concubine. If there was a general shift in the Church's position, therefore, it must have taken place before the fifth century. Moreover, it is one thing to tolerate concubinage in the Church, requiring only that the persons involved conform with Christian morality, and it is another to affirm that an alliance of this nature constitutes an indissoluble bond and prevents the free partner from marrying another, free person. The latter is what is in question in Leo's reply to Rusticus. Roman tradition itself would have suggested to Romano-Christians that concubinage was, on the one hand, a respectable, monogamous relationship, and on the other hand something that fell short of true marriage.

Leo's position, I submit, was a product of the notion of the *lex divina*. From this perspective, it became possible to ask whether a marriage was legitimate or valid in divine law, as well as in civil law. The two legislations might be in direct opposition, as they were in regard to divorce and remarriage. In this case, divine and human laws were in agreement, for Leo christened the civil principle that there was no *conubium* between a free person and a slave. In the decision attributed by Hippolytus to Callistus, on the contrary, the question of the legitimacy of marriages that were invalid in civil law did not arise. Callistus could declare that the alliances in question were permissible and he could give his blessing to them, but he could not declare them to be legitimate because the Church had not yet appropriated the notion of marital legitimacy.

It is evident that there was always a range of opinion regarding the toleration of such "mixed" alliances within the Church. Callistus made concessions here but Hippolytus opposed them. Concubinage was often tolerated in the fourth century, provided that it conformed with the moral standards of Christian marriage, but Ambrose maintained that any alli-

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<sup>30</sup> Gaudemet, "La décision," p. 115.

<sup>31</sup> *Ibid.*, p. 105, n. 11.

ance that fell short of legitimate marriage was culpable.<sup>32</sup> We do not know whether the Church in the early period (that is, before the fourth century) treated an alliance of this kind as something that contained an indissoluble bond and presented an impediment to marriage with another, free person. Leo thought not. Augustine (whose mistress must have been beneath him in social standing, if not servile) and his mother took a similar view. Legitimate marriage between two free persons was probably always considered preferable to concubinage between a freeman and a bondswoman. If a man already had a concubine, he could marry legitimately either by making a *mulier honesta* of her or by dismissing her and marrying a woman of his own class. It is the readiness to accept the latter course that seems so shocking to modern readers of Leo's letter to Rusticus and of Augustine's *Confessions* (VI.13[23] and 15[25]). We are faced with values and ideals that are entirely different from our own, and the root of this difference is that they accepted the *de iure* existence of caste, servility and subservience while we do not.

What of a marriage between two slaves? Here evidence is lacking for the patristic period and one must rely on conjecture. Leo based his argument not on servility *per se* but on inequality, for the concubine was in bondage to the man. Moreover, by leaving his servile concubine and marrying a free woman, a man may obtain what Leo calls "an increase of honour" (*profectus honestatis*), but there would be no such increase if a bondsman left one bondswoman to take another, nor even if a bondswoman left a bondsman to become a freeman's concubine. The *contubernium* of slaves was unproblematic from the legal point of view because questions of heredity did not arise.

The Church probably expected Christian slaves to observe the normal moral standards. From the Christian point of view, the chief distinguishing attribute of true marriage was its permanence or stability, but even in this regard there need have been no opposition between the Church and Roman law from the fourth century onwards. Constantine, in AD 325, affirmed that families of slaves should not be broken up when an estate is distributed among several owners. It is intolerable, he declares,

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<sup>32</sup> Ambrose, *De Abraham* I.7.59, *CSEL* 32.1.2, p. 540 "Habet quidem omnis uiri mulierisque concubitus nulla legitimi matrimonii sorte celebratus suam culpam."

that children should be parted from their parents, sisters from their brothers or wives from their husbands (*Cod. Theod.* 2.25.1). If the civil law affirmed that the marriages of slaves were inviolable, there can have been no obstacle to the recognition of their permanence on the Church's part.

We have to wait until the early ninth century for an unequivocal affirmation that a marriage between two slaves is an indissoluble bond and that slaves are united in matrimony by God in the same way as free persons are. At the Council of Chalôn-sur-Saône in AD 813, it was noted that some masters had broken up the legitimate marriages of their slaves, ignoring the Gospel's injunction that man should not separate what God has joined (*Matt.* 19:6). The council ruled that married slaves should not be separated even if they served different masters, provided that the union was in accordance with the law and had been contracted with the permission of their masters.<sup>33</sup> The ruling of this council is similar to that of Constantine in AD 325 (*Cod. Theod.* 2.25.1), but where Constantine's reasons were humanitarian, applying as well to parents and children and to brothers and sisters as to husbands and wives, the council invoked Jesus' precept that no man may separate what God has joined. The rationale, in other words, was rather theological than humanitarian.

Pope Leo could not accept that marriages between free and servile persons were valid. His opinion was probably not untypical in its time, but in the records of councils held under Pepin in the eighth century a different position emerges: namely, that if a man knew that a woman was servile when he married her, the marriage is valid and he must keep her; but that if, on the contrary, he believed that she was free, then he may divorce her. The same rules applied in the case of a free woman marrying a servile man.<sup>34</sup> A text in Benedictus Levita says, "if a freewoman has accepted [that is, married] a slave, in the knowledge that he was a slave, she should keep him, for there is one law for both the man and the woman."<sup>35</sup> The explanation given at the end suggests that the marriage of a freeman to a bondswoman was likewise valid, provided that he knew her status when they married.

<sup>33</sup> *Concilium Cabillonense* (AD 813) 30, *MGH Conc.* 2, p. 279. This text is repeated in Benedictus Levita, add. III.54 (*PL* 97:878A).

<sup>34</sup> See *Decretum Compendiense* 7, *MGH Capit.* 1, p. 38; and *Decretum Vermeriense* 13, *ibid.*, p. 41.

<sup>35</sup> Ben. Lev. I.20, *PL* 97:707B.

It seems, therefore, that the Church's attitude to the marriage of the unfree shifted considerably in Carolingian Christendom. Perhaps this was because of a general raising of the status of servile persons. The word *servus* did not mean in ninth century Francia what it had meant in fourth century Rome. The decision of the Council of Chalôn-sur-Saône in AD 813, noted above, may be another sign of the same shift. Leo's affirmation, in his letter to Rusticus, that a concubine cannot be validly married unless she has been set free, given a dowry and married in a public wedding, often appears in Carolingian sources, including Benedictus Levita,<sup>36</sup> but here its import is different. From the Carolingian point of view, Leo had affirmed not that a freeman could not marry a bondswoman, but that marriage is not valid without such formalities as betrothal, dotation and even public nuptials. Thus the Council of Mainz in AD 852, affirming that a true wife must be "legitimately betrothed" (*legitime desponsata*), appeals to Leo's reply to Rusticus and quotes from it without making any reference to bondage or inequality:

*On concubines.* If anyone has had a concubine whom he had not legitimately betrothed, and later, having dismissed the concubine, took a girl in marriage whom he had formally betrothed, he should have the one whom he legitimately betrothed. Pope Leo determines what is true in this matter as follows: there is no doubt that a woman in whom we are taught there is no nuptial mystery does not attain to matrimony. Those who have been joined to men by their fathers' will are free of blame if the men had women who were not married to them, for a married woman is one thing and a concubine another.<sup>37</sup>

The crux of Leo's discussion has disappeared. These bishops appealed to his authority in support of a thesis which, as far as we know, he did not maintain: namely, that there cannot be a valid marriage without a formal betrothal (and thus without dotation, for this was an integral part of the betrothal).

The legal validity of marriages between free and servile persons remained open to doubt and objection even in the high Middle Ages. Nevertheless, by this time the attention of canonists and theologians had shifted to the more complex situation in which a free person married a slave unwittingly.<sup>38</sup> In this case

<sup>36</sup> Ben. Lev. III.59-60 (807B) and III.105 (810B-C).

<sup>37</sup> *Conc. Moguntinum* (AD 852) 12, *MGH Capit.* 2, p. 189.

<sup>38</sup> *Error conditionis liberae* survived as a diriment impediment in Roman

it was the error, rather than inequality *per se*, that impeded the marriage. When Gratian affirmed that there was nothing to prevent a freewoman from marrying a bondsman, nor a bondswoman a freeman, as long as they married in the Lord, and this because there was no distinction between slaves and free persons in Christ,<sup>39</sup> his reasoning was typical of the high Middle Ages.

Looking with the benefit of hindsight at the contrasting positions of Leo, in the early Middle Ages, and of Gratian, in the high Middle Ages, one may be led to the sobering conclusion that theology can be remarkably passive vis-à-vis prevailing social norms. One may perhaps be reminded of the manner in which Christianity in our own era seems to have moved from right to left in South America. Leo denied the validity of marriages between free persons and slaves while Gratian affirmed it, but both appealed to Scripture and to fundamental theological premises. Were we to attempt to explain why they differed in this way, we should have to appeal in the first place not to theology or to Scripture but to *social* changes. It might be argued that the benign influence of the Gospel encouraged these social changes, but it is also arguable that the social norms determined what was read out of Scripture (or into it). Inasmuch as this was the case, it seems that religion does not shape but rather is shaped by prevailing social norms.

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Catholic canon law until modern times.

<sup>39</sup> C.29 q.2, dictum ante c.1 (1:1092).



## CHAPTER EIGHT

### THE MATTHEAN EXCEPTION IN THE FATHERS

Jesus teaches in the synoptic gospels that divorce was not part of the original, God-given order of things. Man should not separate what God has joined together. In Matthew's gospel alone, Jesus makes an exception of some kind in the case of *porneia* or "unchastity" (*fornicatio* in the Latin versions). Any man who divorces his wife, Jesus says, *except for unchastity* and marries another commits adultery (Matt. 19:9). One must now regard the sense of this exceptive clause as obscure and controvertible.<sup>1</sup>

Matthew sets the episode in the context of the contemporary rabbinic debate over the sense of Deuteronomy 24:1.<sup>2</sup> Some, following the strict interpretation of Rabbi Shammai, maintained that this text permitted a man to divorce his wife only on the ground of sexual impropriety or infidelity. Others, following the latitudinarian interpretation of Rabbi Hillel, maintained that it permitted a man to divorce his wife if she displeased him in any way. Thus in Matthew's version alone, the Pharisees ask Jesus whether it is lawful for a man to put away his wife "for any reason whatever." But this does little to explain what Jesus meant by *porneia*. If Jesus meant *adultery*, he would have been siding with the followers of Rabbi Shammai, which is plausible, but he would also have been permitting precisely what he was rejecting: namely, Moses' concession whereby a man may divorce his wife for adultery (Deut. 24:1). In any case, *porneia* is an obscure way of denoting adultery (for which the proper word would have been *moicheia*).<sup>3</sup> Scholars have made several suggestions. *Porneia* may here denote pre-marital intercourse or the infidelity of a betrothed woman

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<sup>1</sup> See *The Jerome Biblical Commentary* (1968), 43:38, 42:60 and 6:57.

<sup>2</sup> See J. Jeremias, *Jerusalem in the Time of Jesus* (1969), pp. 370–71. Mark, on the contrary, presents the discourse as if Jesus were addressing the Gentiles, for here Jesus refers to wives divorcing their husbands (Mark 10:12).

<sup>3</sup> But see W. D. Davies and Dale Alison, *The Gospel according to Matthew*, vol. 1, pp. 528–31. The authors favour the translation "adultery" for *porneia*, although "only with great hesitation." They are persuaded chiefly, it seems, by the antiquity of this interpretation.

(cf. Deut. 22:15 and Matt. 1:19) or prostitution or marriage within the forbidden degrees or even supervenient incest. Be this as it may, the *porneia* of Matthew 19:9 and 5:32 was universally assumed from the early patristic period to be adultery.

We should set the Fathers' opinions in the context of the Biblical data with which they intended them to conform. Once one grants that *porneia* means "adultery," the implication of Matthew 19:9 seems to be that a man whose wife is an adulteress may divorce her and remarry without thereby committing adultery himself; and the point of this implication seems to be that a husband may divorce an adulteress and remarry. The text does not say that the wife of an unfaithful husband has the same right.

St Paul, while reaffirming Jesus' prohibition of divorce, adds that a wife who leaves her husband should remain single: "To the married I give charge, not I but the Lord, that the wife should not separate from her husband (but if she does let her remain unmarried or else be reconciled with her husband) and that the husband should not divorce his wife" (1 Cor. 7:10–11). The important notion that a person who divorces his or her spouse for adultery should remain "unmarried" (*innuptus*) as long as the other spouse is alive came from this text. Note, however, that while Paul refers distinctly to both men and women, he says only that *women* should remain unmarried. Considered together, the witnesses of Matthew and Paul on divorce suggest *prima facie* that a man may divorce his wife for adultery and remarry but that a woman may not. She may perhaps in some extreme circumstances leave him, but she should then remain single.

The double standard entailed by this position would have seemed reasonable from the perspective of pre-Christian traditions. It was in accordance with both Judaic and Roman law, even though the latter permitted a woman to divorce a man. In Roman society, the *univira* (the woman who remained faithful to a single husband) represented the womanly ideal. A wife who remained faithful to her husband after his death was especially admirable.<sup>4</sup> But these were specifically feminine virtues. Moreover, adultery was a crime that a wife and her paramour committed, and a man's infidelity to his wife did

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<sup>4</sup> On the manner in which Christians adopted these ideals, see P. Brown, *The Body and Society* (1988), p. 149.

not in itself make him an adulterer.<sup>5</sup> It was for this reason that Constantine's law on divorce of AD 331 permitted a man to divorce his wife on the ground of adultery but made no corresponding provision for women (*Cod. Theod.* 3.16.1).

If one rejects the double standard, one cannot accept the position outlined above. One may then interpret the Matthean exception in either of two ways. On the one hand, the right of a man to divorce an adulteress and remarry may be extended to women. On the other hand, both men and women may be permitted to separate from their spouses on these grounds, but both would be required to remain unmarried (*innuptus*). It is difficult to square this latter doctrine with Matthew 19:9, the text upon which the Church based the right to divorce on the ground of fornication. Be this as it may, the equality or inequality of men and women in respect of adultery is crucial to how one interprets the Matthean exception. If husband and wife are equal, then the gender-specific aspects of Matthew 19:9 and 1 Corinthians 7:10–11 must be incidental. Whatever the Bible says of him must apply equally to her and vice versa.

It need hardly be said that Scripture is not always in favour of equal rights for women. For an example of the subordination of women one need go no further than 1 Corinthians 11:3 ff. Nevertheless, there is solid Scriptural support for equality in respect of the rights by which husband and wife are bound to one another. First, Scripture says that husband and wife become one flesh or one body, and this relation, as a participation in union, must be mutual and symmetrical. Second, St Paul says that each spouse owes the conjugal debt to the other. The wife has power over her husband's body just as he has power over his wife's body (1 Cor. 7:2–5). It follows that marriage binds a husband to his wife just as it binds a wife to her husband.

So much for the possibilities; what of the actualities? In fact all three of the positions I have outlined occurred during our period. What is in question here, it should be noted, is divorce on the ground of fornication followed by the remarriage of the innocent party while the other is still alive. One finds examples of the first position (inequality, with remarriage for men only) in sources from the fourth and subsequent

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<sup>5</sup> See P. Corbett, *The Roman Law of Marriage* (1930), pp. 141–42; and S. Treggiari, *Roman Marriage* (1991), pp. 262–64.

centuries, and it is arguable that this was the prevailing opinion throughout the Church until at the least the mid fourth century. The second position (equality with the possibility of remarriage) became the normative position in the East. The third position (equality but no remarriage) became the normative position in the West. Jerome and Augustine were among its champions (its *early* champions, in my view).

According to what we now regard as the normative Western position, the only permissible ground for divorce is adultery. On that ground, either partner may divorce the other, but neither can remarry as long as the other is alive. When and where did this regime originate? In what provinces and in what periods did it prevail?

One should admit that the regime in any region or province of the Church before the late fourth century, East or West, remains obscure. On the one hand, there is little or no direct evidence that the strict but egalitarian position prevailed in any province of the Church before the era of Jerome and Augustine. Indeed, there are very few surviving texts from the earlier period that explicitly affirm that the husband of an adulteress must not or should not remarry. On the other hand, there are few if any texts from before the fourth century that affirm unequivocally that a husband *may* remarry in these circumstances.

Since the evidence is not decisive and can be interpreted in different ways, a scholar's preconceptions regarding the regime of the early Church will determine how the evidence should be interpreted. For example, when a medieval source permits divorce and remarriage, those scholars who assume that the strict regime existed from the beginning will suppose that the source represents a decline or an aberration, while those who believe that the strict regime was a fourth century innovation will see it as a survival. For similar reasons, Ambrosiaster's opinion that a man, but not a woman, who has divorced his spouse for adultery may remarry may seem either eccentric or conservative, according to one's preconceptions.

Can we come to any conclusion at all about the regime in this early period, even an informed guess?

I think that in this case we may learn something useful from the methods of Mr Sherlock Holmes. In Sir Arthur Conan Doyle's story *Silver Blaze*, the solution of the case turns on what a dog did in the night. Holmes reveals this at an early stage of the inquiry, but no-one else can see the point, since there

are no reports of the dog's doing anything. But that is the point: it is significant that the dog did *not* bark, for it shows that the culprit was well known to the dog.

In our case, we find two significant silences. First, if a strict regime that entirely excluded remarriage after divorce had prevailed in the early period, we should surely have heard about it, for it is not the kind of thing that one leaves unspoken. Second, if an egalitarian regime had existed before this time, we should have heard about this as well, for such a regime is contrary to the apparent sense of Matthew and Paul.

I assume that the position of inequality, with licit remarriage for men only, prevailed until the late fourth century.<sup>6</sup> We might call this the *lex antiqua* or *l'ancien regime*. The egalitarian position probably became established in the late fourth or early fifth century, first in North Africa and then Rome. While the remarriage of the husband of an adulteress, like the remarriage of a widow, may always have been widely regarded as something that fell short of the Christian ideal, the regime that *prohibited* such marriage on pain of excommunication was the product of a fourth- and fifth-century movement of reform.

One should distinguish here between two aspects of the normative Western position that are sometimes confused. They are certainly closely related, but they are distinct nonetheless. One aspect is the prohibition of remarriage in all circumstances: not only the wife but also the husband must remain "unmarried" after divorce, and this even after licit divorce on the ground of adultery. The other is the doctrine that remarriage while one's spouse is alive is not only forbidden but invalid. In other words, it is not marriage at all, but adultery in a strict and legal sense. Since liceity and validity are not the same, the crucial question is what the person who had been excommunicated for having remarried had to do to be received back into the Church. It seems to me unlikely that this other aspect of the normative Western position (namely, the annulment of remarriage) prevailed in any province of the Church before the late fourth century. Rather, it was another product of the same fourth- and early fifth-century reform.<sup>7</sup> Our chief concern here is not with this aspect of the normative Western

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<sup>6</sup> Here I am indebted to Giovanni Cereti's *Divorzio, nuove nozze e penitenza nella Chiesa primitiva* (1977).

<sup>7</sup> See G. Cereti, *ibid.*, pp. 270–354.

position, but with the prohibition of remarriage and the doctrine that adultery was the only valid ground for divorce. Nevertheless, the two aspects were related, for those, such as Augustine, who insisted on indissolubility argued that men could not remarry after divorcing adulteresses, and that the male divorcee, like the female divorcee, had to remain "unmarried." Lactantius, who had died ca. 320 AD, had insisted on equality in the matter of adultery, but we find in the writings of the Latin Fathers of the late fourth and early fifth centuries, for the first time, a tightly argued position in which the principle of equality is crucial to a doctrine of indissolubility.

Roman law provides corroborative albeit indirect evidence that what became the normative Western position was not universal during the patristic period. Among the salient characteristics of the latter position are the following. First, one may divorce one's spouse only on the ground of adultery. Second, a wife has the same right in this matter as a husband. Third, one may not remarry under any circumstances while one's spouse is alive, even after a valid divorce on the ground of adultery. The divorce law of the Christian emperors was clearly different on each count. First, the emperors permitted divorce on several grounds. Second, while they permitted a man to divorce his wife for adultery, this was not among the grounds on which a woman could divorce her husband.<sup>8</sup> Third, they freely permitted remarriage after licit divorce. That was why one would divorce one's partner. As Noonan has argued, it is highly unlikely that Theodosius and Justinian would have rashly pursued a policy on divorce that was fundamentally at odds with that of the Church as they knew it.<sup>9</sup> The strict interpretation of the Matthean exception (the position of which Jerome and Augustine were champions) makes no appearance in Roman law. Nor does the notion of indissolubility.

With these presuppositions in mind, we may survey examples of the old and of the reformed position.

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<sup>8</sup> That is to say, a woman could not divorce her husband merely for his infidelity to her. She could divorce him for being an *adulter*: that is, for having a sexual relationship with another man's wife.

<sup>9</sup> J. T. Noonan, "Novel 22," in W. W. Bassett (ed.), *The Bond of Marriage* (1968), 41-90.

*The Position of Inequality: Remarriage for Men Only*

With the notable exception of a passage from *The Shepherd of Hermas*,<sup>10</sup> there would seem to be no Greek patristic sources prior to the fourth century that affirm unequivocally that the husband of an adulteress may not remarry. A passage from Origen's commentary on Matthew may imply, albeit indirectly, that divorced women were not normally permitted to remarry. Here Origen apparently refers to a recent case. He writes:

Some leaders of the Church recently permitted a certain woman to remarry while her husband was still living. By so doing they acted in a way that is not in accordance with the Scriptures, for it is written: "a wife is bound to her husband as long as he lives" [1 Cor. 7:39]; and "she will be called an adulteress if she lives with another man while her husband is alive" [Rom. 7:3]. And yet what they did was not entirely unreasonable. Although this concession is not in accordance with what has been ordained and written from the beginning, it is very likely that they made it in view of worse things that might happen.<sup>11</sup>

Unfortunately, we do not know why the woman had left her husband. Nor is it obvious whether Origen's point is that the bishops acted wrongly but with good intentions, or that they acted rightly (perhaps because in this case pastoral considerations overrode matters of principle). Be this as it may, the point of the text, and the possible source of scandal, seems to be that some bishops have allowed a *woman* to remarry. The passages from Scripture that Origen cites specifically admonish *women* not to remarry.

The gloss on Matthew 19:9 contained in the *Opus imperfectum in Matthaëum* (ca. AD 430) is of especial interest here because its author's analysis of divorce on the ground of fornication, while not entirely coherent, is diametrically opposed to Augustine's.<sup>12</sup> Whereas Augustine maintains that remarriage is always invalid because divorce cannot completely destroy the marriage bond, this author argues that divorce followed by remarriage dissolves the previous marriage because marriage is founded on intention (*voluntas*).

<sup>10</sup> Hermas, *Pastor*, Mand. IV.1(29).5–8, ed. M. Whittaker, GCS, pp. 25–26.

<sup>11</sup> *Comment. in Matthaëum* XIV.23, PG 13:1245A–B.

<sup>12</sup> PG 56:802–803. The commentary survives in a Latin translation but was originally written in Greek. Its author may have been an Arian presbyter of Constantinople called Timothy: see P. Nautin, "L'*Opus imperfectum in Matthaëum* et les Ariens de Constantinople," *Revue d'Histoire ecclésiastique* 67 (1972), 380–408 and 745–766. The treatise was ascribed to Chrysostom in the Middle Ages.

Since Jesus says that "whoever divorces his wife except on the ground of fornication and marries another commits adultery," the author begins by defining what kind of divorce is in question. Because it is intention that makes marriage, and not sexual intercourse, a man who divorces his wife but does not remarry does not dissolve his marriage. He remains his wife's husband. If he marries again, on the contrary, he dissolves the marriage. In other words, he fully divorces his wife. The author explains that in this regard marriage conforms with God's relationship to his Church. Since the Christian man ought to imitate God, he must behave towards his wife as God behaves toward the Church, and God has never left his people *unless they were unfaithful to him and deserted him first*: that is to say, unless they joined the gentiles or became heretics. Similarly, a man should not divorce his wife except in the case of her infidelity. If a man's wife is acting against her husband in other ways, she may deserve to be divorced, but rather than do this he should rather strive to correct her, by threats and force if needs be, while continuing to be merciful towards her. God treats his people and his Church in the same way. If God had abandoned his people, they would have turned to the worship of pagan gods. Similarly, a man who divorces his wife may cause her to commit adultery (cf. Matt. 5:32). But if a man's wife is already unfaithful, then he may divorce her. God only abandoned his people when they allied themselves with the Devil and killed his son.

The author's analysis of divorce on the ground of fornication suggests that a husband who divorced his wife on this ground would be free to remarry. The author gives no statement or argument to the contrary. There is good reason to suppose that in the author's view, the wife of an adulterer could not divorce him and remarry. First, the text envisages only the circumstance in which men have errant wives, and not vice versa, and therefore includes a discussion of the ways in which a man should try to correct and discipline his wife. He may even beat her if she proves unresponsive. Second, the analogy between a husband's relation to his wife and God's relation to his people gives no license to the woman. Third, the author's chief argument, which comes from Matthew 5:32, is that a man who divorces his wife and remarries commits adultery inasmuch as he may cause his wife to commit adultery. It is not because he is still married to the first woman that his second marriage is adulterous, but rather because by marrying again and closing the door to



reconciliation he has "fully divorced" her. The argument presupposes that former wife is obliged to remain single. Since she may find this hard to sustain, a man should not divorce his wife unless she is already guilty of adultery.

The position of the Council of Elvira (ca. AD 300), insofar as the record of the council can be relied upon, seems to have been that a man could divorce his wife for fornication and remarry, while a woman did not have this right.<sup>13</sup> First, a woman who abandons her husband without just cause and remarries is to be excommunicated for life (can. 8). If her husband is an adulterer, she is still not permitted to marry again, but the penalty for so doing is less severe: she is excommunicated as long as her ex-husband is alive, although she may receive communion if she is seriously ill (can. 9). Thus adultery on her husband's part mitigates her guilt if she remarries, but it does not remove it. Second, a man who knows that his wife is an adulteress ought to dismiss her. If he does not do so, he may be excommunicated for life. If he tolerates her adultery for a while but subsequently leaves her, he is to be excommunicated for ten years (can. 70; see also 65). If a man dismisses his wife without just cause and another woman marries him in full knowledge of the circumstances, the latter woman is to be excommunicated for life (can. 10).<sup>14</sup> There is no indication in the canons that a woman whose husband committed adultery was required or expected to leave him. Nor is there any indication that a man who divorced his wife on the ground of adultery had to remain unmarried.

The following much-discussed decree from the Council of Arles in 314 is more problematic:

Concerning those men who find that their wives are committing adultery—these being young Christian men who are forbidden to marry [*prohibentur nubere*]<sup>15</sup>—it is decreed that as far as possible [*quantum possit*] they should be counseled [*concilium eis detur*] not to marry again as long as their wives are alive, even though the latter are adulteresses.<sup>15</sup>

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<sup>13</sup> See H. Crouzel, *L'Église primitive face au divorce* (1971), pp. 119–21; and G. Cereti, *Divorzio* (1977), pp. 337–44.

<sup>14</sup> The texts, with valuable commentary, are in Hefele-Leclercq I.1, pp. 226–227, 257 and 259.

<sup>15</sup> *Conc. Arelatense* (AD 314) 11(10), CCL 148. p. 11. See also J. Gaudemet (ed.), *Conciles gaulois du IV<sup>e</sup> siècle*, SC 241, pp. 50–52 and p. 51, n. 1 (text, translation and commentary).

Clearly, the men in question ought not to remarry, but might be inclined to do so because of their youth. The decree urges that they should remain unmarried, but it does not *require* that they must do so, nor does it impose any sanction upon those who do not. The affirmation that as Christians they are forbidden to remarry (*prohibentur nubere*) seems to contradict what comes next. The hypothesis that the word *non* should be supplied before *prohibentur* is rash. Henri Crouzel is surely on the right track when he argues that the first part of the decree pertains to doctrine and the latter part to practice.<sup>16</sup> The decree does not so much permit as tolerate or concede remarriage. Permission to remarry takes the form of an *indulgentia* made in view of incontinence. The last clause of the decree ("even though the latter are adulteresses") suggests that the men in question would expect themselves to be free to remarry. There is no provision for women to remarry.

Lactantius (d. ca. 320) says that "a wife must not be divorced unless convicted of adultery, so that the bond [*vinculum*] of the marital compact should never be dissolved except when it has been broken by infidelity."<sup>17</sup> Adultery is a special case, for the adulterous spouse takes the initiative in violating the relationship. Lactantius probably believed that a man could remarry in this circumstance, for he defines an adulterer as "he who marries a woman dismissed by her husband, and he who dismisses his wife except in the case of the crime of adultery to marry another woman."<sup>18</sup>

Would Lactantius have extended the same right to the wife of an adulterer? He rejected the double standard of civil law in the matter of adultery, arguing that a man's infidelity was as bad as a woman's. Since "God joined together man and woman in the union of one body," the husband is "constrained by the same law" as his wife.<sup>19</sup> He may well have accepted that a wife had the right to separate from an adulterer. It is unlikely, despite his rejection of the double standard, that he

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<sup>16</sup> *L'Église primitive face au divorce* (1971), pp. 121–23.

<sup>17</sup> *Divinarum institutionum epitome* 61(66).8, *CSEL* 19, p. 748: "Ideo praecipit [praeceptit?] non dimitti uxorem nisi crimine adulterii revictam, ut numquam coniugalis foederis vinculum nisi quod perfidia ruperit resolvatur."

<sup>18</sup> *Divinae institutiones* VI.23, *CSEL* 19, pp. 569–70: "... adduntur illa [praecepta] ... adulterum esse qui a marito dimissam duxerit et eum qui praeter crimen adulterii uxorem dimiserit, ut alteram ducat ..."

<sup>19</sup> Lactantius, *Epitome* 61(66).8, *CSEL* 19, p. 748. See also *Divinae institutiones* VI.23, *CSEL* 19, p. 568.

would have gone against St Paul's admonition that a woman who separates from her husband should remain unmarried.

Ambrosiaster, who was active during the pontificate of Damascus I (AD 366–384), maintained that a man might divorce his wife on the ground of fornication and remarry, but that woman could not do so. If she does separate from her husband, she should remain unmarried. Commenting upon 1 Corinthians 7:10–11, he remarks in regard to the final statement of this text (“the husband should not divorce his wife”) that the words “except for fornication” should be supplied. He continues:

... [Paul] does not add, as he does when he speaks of the woman, “but if he does separate, let him remain he is.” For the man is permitted to marry after divorcing his sinful wife, because he is not constrained by the law in the same way as the woman, since the man is the head of the woman.<sup>20</sup>

Ambrosiaster gives no indication that he was conscious of advocating an unusual position. Rather, he aims merely to explain why the position is what he assumes it to be. In this as in some other matters, he probably reflects conservative Roman opinion.<sup>21</sup>

We know that the right of women to divorce their spouses for adultery hardly existed *de facto* in Rome in the early fifth century, despite the *de iure* acceptance of the Augustinian position at this time. In AD 405, Pope Innocent I affirmed in a rescript to Exsuperius of Toulouse that the woman's right to prosecute her husband for adultery before an episcopal tribunal, but he admitted that there was little chance of her securing a conviction. His explanation (which is less than convincing) was that it was harder for women to gather the necessary evidence.<sup>22</sup> The right of women to prosecute their husbands for adultery was not recognized even *de iure* in Exsuperius's diocese.

The Council of Vannes, in Brittany, which took place between AD 461 and 491, decreed that:

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<sup>20</sup> Ambrosiaster, *Ad Corinthios prima* 7:11, CSEL 81.2, p. 75. On the dating of Ambrosiaster's commentaries on Paul and of his *Quaestiones*, see D. G. Hunter, “On the Sin of Adam and Eve: a little-known defense of marriage and childbearing by Ambrosiaster,” *Harvard Theological Review* 82 (1989), pp. 284–85.

<sup>21</sup> On Ambrosiaster's conservatism, see David Hunter, “On the Sin of Adam and Eve,” *Harvard Theological Review* 82 (1989), 283–99, esp. pp. 286–87 and 298–99.

<sup>22</sup> *Epist.* 6.4, *PL* 20:499B–500A.

Those . . . who have left their wives, as the Gospel says, "except on the ground of fornication," and who, without giving proof of adultery, have married again . . . are to be cut off from communion, lest through our indulgence toward their sins others should follow their example and be led into the license of error.<sup>23</sup>

In other words, men who remarry after divorce are to be excommunicated for adultery *except* when the divorce is on the ground of proven fornication. The decree simply translates Matthew 19:9 into ecclesiastical law. G. H. Joyce argues that since "there is no certain sign of any toleration of the abuse [remarriage after divorce] by the bishops before the eighth century," the canon cannot imply that bishops permitted divorce and remarriage in the case of proven adultery. He concludes that the aim of the canon was both to prohibit, on pain of excommunication, remarriage after civil divorce, and to remind Christians that the only ground for divorce was adultery.<sup>24</sup> This interpretation is a clear case of *petitio principii*. The decree of Vannes is itself good evidence regarding the Gallic regime in late antiquity, and there is little other evidence besides. Joyce simply assumes that remarriage after divorce was absolutely forbidden from the beginning of the Christian era, and reasons that any subsequent instances of toleration were deviations from the ancient norm. Furthermore, consistency requires Joyce to assume that "the wording of the canon is clumsy." Since the canon cannot mean what it seems to say, in other words, it must mean something entirely different. If one assumes, on the contrary, that the text means what it seems to say (and there is nothing obscure about it), then one must accept that a man who could prove that his wife was guilty of adultery would *not* have been excommunicated if he married another woman. The text says nothing about women divorcing their husbands.

A decree from the Visigothic Council of Agde in Southern France, which took place in AD 506 under Caesarius of Arles, implies that a man could not leave his wife and marry another woman unless it had been proven before an episcopal tribunal that his wife was guilty of some serious but unspecified crime. The decree concerns men who dissolve their marriage because of some fault (*culpa gravior*)<sup>25</sup> but without offering any

<sup>23</sup> *Conc. Veneticum* (AD 461–491) 2, CCL 148, p. 152.

<sup>24</sup> G. H. Joyce, *Christian Marriage* (1933), pp. 320–21.

<sup>25</sup> "... coniugale consortium culpa graviore dimittunt vel dimiserunt. . . ."

grounds for divorce that can be proved, intending thereby to enter into new marriages that are *illicita aut aliena*.<sup>26</sup> The council determines that if men put away their wives before stating the grounds for divorce to the bishops of the province and before their wives have been condemned by a tribunal (*iudicium*),<sup>27</sup> they are to be cut off from communion with the faithful, "because they pollute both their *fides* ["faith" or "fidelity"] and their marriages."<sup>28</sup>

This decree refers only to the circumstances in which a man may dismiss his wife and says nothing explicitly about whether or not he may then remarry. Moreover, it mentions remarriage only as the *motive* for divorce. It is not likely, however, that a person who merely separated from his spouse, without remarrying or planning to do, would be subject to excommunication, a penalty reserved at this time for serious crimes such as murder, adultery and heresy. And men who unjustly repudiated their wives but did not remarry would hardly be said to "pollute their faith and their marriages." The decree cannot pertain only to divorce without remarriage. On the contrary, the bishops did not envisage the possibility of the man's remaining unmarried after divorcing his wife, but rather assumed that a man who divorced his wife did so in order to marry another woman.

The position of the bishops at Agde, then, seems to have been much the same as that of the bishops at Vannes. They were ruling that a man cannot leave his wife and marry another woman without first obtaining an ecclesiastical divorce. In the case of Agde, the text does not say what constituted sufficient grounds. Adultery may not have been the only ground, but it must have been one of them. Both of these sources, Vannes and Agde, refer exclusively to men divorcing and remarrying.

The same requirement that a man should prove that his wife has committed adultery before he may divorce her and remarry appears in a law ascribed to Chindasvind in the

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In Gratian's version of the text, *nulla* is inserted before *culpa graviore*: "for no serious fault" (C.33 q.2 c.1, 1150-51).

<sup>26</sup> The meaning of the last phrase is unclear. Joyce (*Christian Marriage*, p. 335) offers "unlawful or with other men's wives."

<sup>27</sup> The word *iudicium* may refer either to a civil tribunal (as Joyce states) or (more probably) to the bishops' determination or sentence: the man would put the evidence for adultery before the bishops and they would decide on the basis of this evidence.

<sup>28</sup> *Conc. Agathense* 25, CCL 148, p. 204.

Visigothic code.<sup>29</sup> Here the double standard is explicit. The preface to the constitution includes a complaint about lax standards: some men are so moved by lust or ambition that they put away their wives by fraudulent means and marry again. The constitution itself begins by saying that no man may leave his wife or formally divorce her "except on the manifest ground of fornication." If he prosecutes her for adultery and a public tribunal finds her guilty, she should be handed over to the judge for him to do with her what he thinks best. A husband who abandons or divorces his wife and marries again without following this procedure may be publicly flogged, he may have his head shaved, he may be sent into exile, and he may even be given away as a slave. Husband and wife may separate to serve God, but only by mutual agreement, so that neither has any excuse for remarrying later. (It seems that they would both convert.) A wife may not leave her husband or (according to an addition by Ervig) marry another man. There are two exceptions to this rule: she may divorce him if he has committed homosexual acts, or if he has made his wife commit adultery against her own will, "because this kind of depravity must never be permitted between Christians."<sup>30</sup> In these cases, and in these alone, she may marry another man if she wishes. We should note that a husband's adultery is not an exception.

Chindasvind's chief aim was to bring practice into line with the precepts of Jesus. There is no mistaking the echo of Matthew's gospel in the phrase *excepta manifesta fornicationis causa*. Since the right of a woman to divorce her husband for his making her commit adultery is a natural extension of the principle that the man may divorce his wife for adultery, the only outright addition to the evangelical rule consists in the woman's right to divorce her husband for homosexual acts.

The early English penitential collections ascribed respectively to Egbert of York and to Theodore of Canterbury recognize the right of a man to divorce his wife for adultery, although only in the case of his first marriage. The adulteress may remarry after five years, but only if she does penance.<sup>31</sup> Similarly, according to the penitential of Theodore, a man whose

<sup>29</sup> *Lex Visigothorum* 3.6.2, *MGH Leges* I, vol. 1, pp. 167–68.

<sup>30</sup> Justinian likewise ruled that a woman could divorce her husband for trying to make her commit adultery: see *Nov.* 117.9.3.

<sup>31</sup> *Penitential* II.12.5, ed. Finsterwalder, *Die Canones Theodori Cantuariensis* (1929), p. 326 (or Haddan and Stubbs, vol. 3, p. 199). *Confessionale Pseudo-Egberti* 19, in Wasserschleben, *Die Bussordnungen* (1851), p. 308.

wife has entered a monastery may remarry, but again only if she was his first wife.<sup>32</sup> A woman, on the contrary, cannot divorce her husband, even if he is a fornicator, unless she enters a monastery.<sup>33</sup> These early English penitentials are in general tolerant of remarriage. Moreover, Theodore's penitential sometimes reflects Eastern practices and regulations. The penitentials presuppose some distinction, however, between liceity and toleration, so that a man's remarriage after the divorce of his wife on the ground of adultery is licit in some circumstances, and not merely tolerated.

The right of men to divorce their wives for adultery and to remarry was apparently recognized at the Council of Rome convoked by Pope Eugenius in AD 826. Here the bishops determined that a man cannot leave his wife and remarry except on the ground of fornication. Some scholars have doubted the authenticity of this source, but its antiquity is not in doubt.<sup>34</sup>

Some have supposed that these early medieval rulings were deviations from the ancient traditions of the Church, the product of backsliding and of compromising with the standards of secular law and custom. But one may also, and with at least equal likelihood, regard them as survivals of the regime of the early Church. The significance of Elvira and Ambrosiaster and the apparent sense of Matthew 19:9 and 1 Corinthians 7:10–11 point in that direction.

*The Position of Equality: Separation or Divorce  
Without Remarriage*

*The Shepherd of Hermas*

As we have noted, few sources prior to the mid fourth century affirm that a man who has dismissed his wife on the ground of adultery should not remarry, but one that does so is a very early source, namely *The Shepherd of Hermas*.<sup>35</sup> The treatise was composed, probably in Rome, in the mid second century. Hermas asks the Angel of Repentance what a man should do when his wife is an adulteress:

<sup>32</sup> II.12.8, ed. Finsterwalder, p. 327 (Haddan and Stubbs, p. 199).

<sup>33</sup> II.12.6, *ibid.*

<sup>34</sup> *Conc. Romanum* (AD 826) 36, *MGH Conc.* 2, p. 582: "Nulli liceat, excepta causa fornicationis, adhibitam uxorem relinquere et deinde aliam copulare; alioquin transgressorem priori convenit sociari coniugio."

<sup>35</sup> See G. Cereti, *Divorzio* (1977), pp. 171–76.

I said to him: Lord, if someone has a wife who is a believer and he discovers that she is committing adultery, is it a sin for the man himself to continue living with her? And he replied: As long as he is unaware of it, he does not sin. But if he continues to live with her even though he knows of her sin, and if the woman does not repent but persists in her unchastity, then he becomes culpable along with her and an associate in her adultery. I said to him: What should the man do if the woman continues in her passion? He replied: The man should dismiss her [*apoluô*] and remain by himself [cf. 1 Cor. 7:11]. But if he dismisses his wife and marries another woman, he commits adultery. I said to him: What if the woman, having been dismissed, repents and wishes to return to her husband? Should he not take her back? He replied: By all means. By not taking her back he would commit a grave sin. He must take her back if she repents, although not more than once [*epi polu*], for there is but one repentance for the servants of God. It is for the sake of repentance, therefore, that a man ought not to remarry after dismissing his wife. The same practice should be observed both in women and in men.<sup>36</sup>

Three points should be noted in regard to this text.

First, we know why adultery is a special case. Inasmuch as marriage is in essence a union in one flesh, the spouses should endure most kinds of tension and discord. But adultery (from this point of view) vitiates the very essence of marriage, for the adulteress becomes one flesh with another man. By remaining with her, the husband involves himself in her indecency.

Second, Hermas's rationale is fundamentally different from that which we shall see in later sources. According to Hermas, the man should remain as he is, without marrying again, so that his wife may repent and return to him. By cutting off the possibility of her returning to him, he would take away her only chance of making amends for her infidelity. While the proponents of the later Western position, according to which remarriage is absolutely forbidden, do not rule out the possibility of reconciliation, they rarely mention it either. Their rationale is more legalistic and less motivated by pastoral considerations. Their thesis is simply that a man has a right to divorce an adulteress but does not have the right to marry again. They usually maintain that he cannot marry again because he is really still married to the first woman. Whatever the reason, the man is at liberty to regard the divorce as permanent.

Third, when Hermas says that the man may divorce his wife

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<sup>36</sup> Hermas, *Pastor*, Mand. IV.1(29).5–8, ed. M. Whittaker, GCS, pp. 25–26.



but should remain as he is, he is paraphrasing 1 Corinthians 7:11. In that verse, however, it is the woman who has to remain unmarried after leaving her spouse. Hermas later says that the same practice should be observed both by women and by men. He hardly needed to add that women should not remarry, for no-one would have attributed more freedom to them than to men. The point of the final remark, I take it, is that a man, as well as a woman, should obey St Paul's command and remain unmarried after separating from an adulterous spouse.

Scholars have seen in this text a witness to the antiquity of the normative doctrine of the Western Church, but in fact it is unique. We have to wait until the fourth century to find other sources stating explicitly that a man who has divorced his wife for fornication must not remarry.

### *Tertullian*

When we turn to the Latin Fathers of the period before Ambrose, we might reasonably expect Tertullian (d. ca. 225) to affirm without equivocation that remarriage after divorce is entirely prohibited and that the man who divorces his wife for fornication should remain unmarried.<sup>37</sup> There was no keener champion of fidelity. Even in his treatise to his wife (*Ad uxorem*), which he wrote while he was an orthodox Catholic and before he turned to Montanism, Tertullian maintained that widows ought not to marry. (He conceded then that a second marriage was not forbidden. Later, as a Montanist, he believed that it would be a form of adultery.) Tertullian raised the Roman ideal of the *univira* to the status of an article of faith.

We have no direct evidence as to Tertullian's position on the Matthean exception before he turned to Montanism,<sup>38</sup> but we are able to compare his views on the matter at two stages after his conversion: that is, in the *Adversus Marcionem*, which he probably wrote soon after his conversion and which contains little explicit evidence of Montanism; and in the later *De monogamia*, in which he treats marriage and remarriage from a thoroughly Montanist perspective. In the former treatise he

<sup>37</sup> See P. Mattei, "Le divorce chez Tertullian. Examen de la question à la lumière des développements que le *De monogamia* consacre à ce sujet," *Revue des Sciences religieuses* 60 (1986), 207–34.

<sup>38</sup> The only statement on the subject is his remark in *Ad uxorem* II.2.8 (CCL 1, p. 386) that the Lord "prohibits divorce, except on the ground of unchastity [*nisi stupri causa*], but commends continence."

seems to assume both that remarriage after divorce on the ground of fornication is not strictly forbidden and that it is contrary to the spirit of the Gospel. In the latter treatise, he considers remarriage to be forbidden and invalid in any circumstance.

Marcion maintained that the Old and New Testaments were not mutually consistent, and that the God presupposed in the Old Testament could not be the God revealed by Jesus. The difference between the positions of Moses and of Jesus on divorce was a case in point. Marcion's objection (as reported by Tertullian) was as follows.<sup>39</sup> Jesus taught that a man who dismisses his wife and marries another is an adulterer, and likewise that a man who marries a woman who has been dismissed by her husband is an adulterer (Luke 16:18). He prohibited both divorce and the marriage of a woman who had been divorced. Moses, on the contrary, permitted a man to dismiss his wife by means of a bill of repudiation if she did not find favour with him because of her "immodest behaviour" (*impudicum negotium*; see Deut. 24:1-2).<sup>40</sup> "Do you not see," asks Marcion, "the difference between the Law and the Gospel, between Moses and Christ." As Tertullian himself notes,<sup>41</sup> this is an odd line for Marcion to take since in his view the followers of Christ ought to loosen those ties, including marriage, by which they were bound to one another.<sup>42</sup>

Tertullian's defense of his faith against Marcion leads him to approach Jesus' treatment of divorce from an unusual angle. Jesus himself seems to revoke the Mosaic law on divorce, explaining that in the beginning it was not so. Commentators usually emphasize the difference between the law of Christ and the law of Moses. Tertullian, on the contrary, attempts to demonstrate that the Old Law and the Gospel are essentially in agreement.

In formulating his objection, Marcion cited Luke 16:18. Tertullian points out that Jesus himself, responding to the Pharisees in Mark 10:2 ff. and Matthew 19:4 ff., explains how he stands with regard to the Mosaic law of divorce. Even while confirming the law that God established as Creator, Jesus excused and defended the constitution made by Moses.<sup>43</sup> According

<sup>39</sup> *Adv. Marcionem* IV.34, *CCL* 1, pp. 634 ff.

<sup>40</sup> The same source permits a woman who had been repudiated to marry again, but this is not mentioned.

<sup>41</sup> IV.34.5, p. 636.

<sup>42</sup> See *ibid.*, I.29.1, pp. 472-73.

<sup>43</sup> IV.34.2-3, p. 635.

to Marcion, Moses permitted divorce and Christ prohibited it, but the opposition between them is not as complete as this would suggest, for Christ's prohibition of divorce was not absolute but conditional:

For I say, in view of this, that Christ prohibited divorce on a certain condition: namely, if a man dismisses his wife in order to marry another woman. For he says: "He who dismisses his wife and marries another commits adultery, and he who marries a woman dismissed by her husband is likewise an adulterer" [Luke 16:18]: in other words, a woman dismissed on that ground upon which it is not permitted to dismiss another, namely so that one may marry another woman. Someone who marries a woman who has been dismissed illicitly is as much an adulterer as he would be if she had not been dismissed.<sup>44</sup>

The dictum from Luke, according to Tertullian, implies that divorce is prohibited not absolutely but only when the reason for repudiation is to remarry. One might gloss the text in the following way: "He who dismisses his wife to marry another commits adultery, and he who marries a woman whose husband has dismissed her for this reason is likewise an adulterer."

Tertullian next clarifies the points he has made. A marriage that has not been validly dissolved remains in existence, and to marry a second person while one is still married to the first makes one an adulterer. Since Christ prohibited divorce conditionally, he did not prohibit it in every case, but rather has permitted it in some cases: namely, those such that the ground on which Christ forbade divorce does not obtain ("ubi causa cessat ob quam prohibuit"). This ground, as we have seen, is to marry another. To this extent, Christ confirmed the justice of divorce and did not contradict Moses:

A marriage that has not been validly dissolved [*non rite diremptum*] remains in existence, and as long as it does so remarriage is adultery. Thus if [Christ] conditionally forbade men to divorce their wives, he did not forbid this entirely, and what he has not forbidden entirely he has permitted in some cases, namely those in which the reason on account of which he forbade it does not obtain. It follows that his teaching was not contrary to that of Moses, whose precept he preserves (I do not go as far as saying confirms) in certain respects [*alicubi*].<sup>45</sup>

Moreover, Moses and Christ are in agreement regarding the ground upon which one may divorce one's spouse. Moses allows

<sup>44</sup> IV.34.4, p. 635.

<sup>45</sup> IV.34.5, pp. 635–36.

a man to divorce his wife when she is guilty of immodest behaviour (*negotium impudicum*). Similarly, Jesus says in Matthew's gospel that "he who dismisses his wife except on the ground of adultery makes her commit adultery."<sup>46</sup> Tertullian believes that Christ and the Prophet are using different names for the same thing. They are at one with each other and with what has been established by the Creator, for "except on the ground of adultery, the Creator does not separate what he himself has joined together."<sup>47</sup>

There has been considerable disagreement among scholars as to how Tertullian interpreted the Matthean exception in this passage, and in particular as to whether he meant that remarriage after divorce is forbidden.<sup>48</sup> His argument, with its vertiginous use of double negatives, is extremely obscure, and no interpretation makes complete sense of it. Its outline is as follows. Christ condemns as adultery the remarriage of a man who divorces his wife in order to remarry as well as the remarriage of a woman who has been divorced for this reason. (The premise is curiously convoluted.) It follows that when a man divorces his wife for this reason they are really still married to one another. A divorce that fails to end a marriage is invalid, and therefore divorce is invalid when the reason is remarriage. Divorce is valid when the reason for it is not remarriage. Therefore divorce on the ground of fornication is valid.

It is convenient for our purposes to extract from this argument two others that are contained in it. The first is as follows:

- (i) Divorce is prohibited when the reason for it is remarriage.
- (ii) Therefore divorce is permitted when the reason for it is not remarriage. (Because this is an argument *e contrario*, it is a *non sequitur* in strict logic.)
- (iii) The latter condition is satisfied in the case of adultery.

The second argument is as follows:

- (iv) A prohibited divorce is invalid.
- (v) An invalid divorce leaves the marriage bond intact, so that the persons in question are really still married.
- (vi) Therefore the remarriage of either of them is adultery.

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<sup>46</sup> Matt. 5:32. I have literally translated Tertullian's version of the text, which is not the same as the Vulgate's.

<sup>47</sup> IV.34.6, p. 636: "praeter ex causa adulterii nec creator disiungit quod ipse scilicet coniunxit. . . ."

<sup>48</sup> See P. Matthei, "Le divorce chez Tertullian," *Revue des Sciences religieuses* 60 (1986), pp. 218 ff.

The argument of (iv)-(vi) implies (by an acceptable argument *e contrario*, although not in strict logic) that remarriage after a valid divorce (as in the case of fornication) is not adultery.

The discussion is fraught with difficulties and obscurities. The notion of a conditional prohibition is itself difficult. It would seem more natural to maintain that divorce is permitted on certain grounds and otherwise prohibited. Again, there would seem to be many other possible reasons for wanting a divorce than the two posited by Tertullian (i.e., remarriage and adultery). If (as he apparently means) the absence of the motive to remarry is not only a necessary but a sufficient condition for the liceity of divorce, it follows that there must be countless valid grounds other than fornication. For example, a man might want to divorce his wife because she is trying to murder him. Again, Tertullian does not say whether someone who divorced his spouse on the ground of fornication, and not in order to remarry, is nevertheless free to remarry thereafter.

The crux, and the source of the difficulties, is the notion of remarriage as a reason for divorce. Tertullian posits the condition as a purpose or intention: a man is not permitted to divorce his wife in order to remarry; that is, when his reason (the *causa*) is to marry another woman.<sup>49</sup> This reason is simply the intention of the one who divorces. In other words, it is the answer the man would give to the question "what for?"

What was Tertullian's interpretation of the Matthean exception? and what regime did he presuppose? Tertullian did not at this time believe that a man who has validly divorced his wife on the ground of adultery was in some way still married to her. This thesis appears in the later *De monogamia* and will be a cornerstone of Augustine's treatment, but Tertullian had not adopted it when he composed the *Adversus Marcionem*. The notion of what modern canon law calls a *divortium minus plenum* (or *divortium a mensa et thoro*), in contradistinction to a *divortium plenum* (or *divortium a vinculo*), was as yet entirely foreign to him. We do not know whether in Tertullian's view, someone who divorced his spouse on the ground of adultery (and without intending to remarry) was free to remarry. On

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<sup>49</sup> Thus: "ideo quis dimittat uxorem, ut aliam ducat; 'ex eadem utique causa dimissam, qua non licet dimitti, [i.e.] ut alia ducatur,'" "ubi causa cessat, ob quam prohibuit." Cf. Matt. 19:3 ("si licet homini dimittere uxorem suam, quacumque ex causa"), Matt. 19:9 ("nisi ob fornicationem"), and 5:32 ("excepta fornicationis causa").

the one hand, the claim that a man could divorce his wife validly only if he did *not* do so in order to remarry suggests that the man was supposed to remain single. On the other hand, the point of Tertullian's discussion was that Moses and Christ were in agreement, and Moses certainly permitted remarriage after divorce.

How far were Moses and Christ supposed to be in agreement? It is unlikely that Tertullian believed the teachings of Moses and of Christ on the matter of divorce to be one and the same. Rather, he aimed to show that there was some essential solidarity between them.<sup>50</sup> Christ neither revoked nor restated the Old Law, but rather perfected it. Tertullian did not claim that the absence of intention to remarry had been a condition of the validity of divorce under the Mosaic law. The two laws were in agreement inasmuch as both permitted divorce conditionally and both permitted divorce on the ground of fornication. Moreover, the reason for both regimes was that marriage was a union in one flesh. This was why Tertullian said: "except on the ground of adultery, the Creator does not separate what he himself has joined together."<sup>51</sup> Pagans usually divorced in order to marry again, but this was contrary to the teachings of both Christ and Moses. God permitted divorce, but only when adultery has vitiated monogamy. To this extent, Moses and Christ were in agreement. If there was a difference between the two regimes, it was that monogamy was fully realized only under the New Covenant.

Tertullian did not say that a man who divorced his wife on the ground of fornication could marry again, although he did not say either that remarriage would be invalid. Remarriage was invalid only when the first marriage was not validly dissolved, and marriage was validly dissolved when the divorce was on the ground of adultery. But whereas Moses simply ruled that divorce was valid on certain grounds, Christ (according to Tertullian) focused on the *intention* of the one who divorces his wife. The true Christian divorced only to safeguard monogamy. I think that Tertullian assumed that Christian men who divorced their wives ought to remain single. That was

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<sup>50</sup> Cf. *Adv. Marcionem* IV.34.5, p. 636: "et iam [Jesus] non contrarium Moysi docet, cuius praeceptum alicubi conservat, nondum dico confirmat." Tertullian treats the respective teachings of Moses and Jesus on divorce as mutually exclusive alternatives in V.7.6 (p. 683).

<sup>51</sup> IV.34.6, p. 636: "praeter ex causa adulterii nec creator disiungit quod ipse scilicet coniunxit. . . ."

what he understood to be the Christian obligation. But even while emphasizing that it was the endurance of a marriage that made remarriage into adultery, he did not suggest that marriage survived even valid and permitted divorce.

By the time Tertullian wrote the *De monogamia*, his Montanist theology of marriage had caused him to develop the notion of an indissoluble marriage bond. Here he treats divorce as something introduced by Moses and eliminated by Christ, who returned matters to their original and intended condition.<sup>52</sup> He remarks in one passage that St Paul would not have allowed repudiated persons to remarry, since this would be against the original precept (*pristinum praeceptum*).<sup>53</sup> In another passage, he presupposes that even persons who repudiate their spouses on the ground of adultery are not permitted to remarry:

It is because repudiation did not exist from the beginning that even among the Romans there is no record of this kind of harshness [*duritia*]<sup>54</sup> having been committed until six centuries after the founding of the city. They mingled adulterously, however, even though they did not repudiate. But as for us, even if we do repudiate, we are not permitted to [re]marry.<sup>55</sup>

Tertullian's point seems to be that whereas the ancient Romans did not divorce their spouses even in the case of adultery, *we* do repudiate on this ground but are not permitted to remarry. But who are *we*? Some scholars maintain that because Tertullian is comparing *our* practice with that of pagans, he is speaking on behalf of Christianity as a whole and not only of Montanism. But although it is clear that he is not contrasting Montanist and non-Montanist Christian practice, it does not follow that he speaks on behalf of Christendom as a whole. In any case, it is precisely the Montanists, according to Tertullian, who follow the true Christian path. All that can be safely deduced from this text is that one might not remarry after divorce on the ground of adultery in the Montanist community of which Tertullian was a member. Perhaps this was the policy of the Church in North Africa. To deduce that it was the policy of

<sup>52</sup> See *De monogamia* 9.1 ff., ed. Mattei, SC 343, pp. 169 ff.

<sup>53</sup> *De monogamia* 11.10, ed. Mattei, SC 343, pp. 184. Cf. 1 Cor. 7:11. Mattei (*ibid.*, p. 339) suggests that the *pristinum praeceptum* is the commandment of Christ.

<sup>54</sup> In referring to the *duritia* of divorce, Tertullian invokes Matt. 19:8: Moses allowed divorce "ad duritiam cordis vestri."

<sup>55</sup> *De monogamia* 9.8, ed. Mattei, SC 343, pp. 172–74 (or CCL 2, 1242).

the Latin Church as a whole would be to go far beyond what the evidence supports.

Tertullian explains why divorce was not permitted in the beginning, and why Christ prohibited it again and restored the original order. He also explains why Christ permitted divorce in the case of adultery:

As we have already established, to commit adultery is to mix with one's self any flesh other than the original flesh that God joined into two [in one flesh?] or found already joined.<sup>56</sup> Therefore he has abolished divorce, which did not exist from the beginning [cf. Matt. 19:8], in order to defend what has existed from the beginning, namely the perseverance of two in one flesh, and so that the necessity or occasion of carnal union with a third party [*tertia concarnatio*] should not arise. He permits repudiation on one ground alone: namely, when perchance what he sought to avert has already happened.<sup>57</sup>

Divorce is prohibited because by abandoning one's spouse, one exposes her to the risk of *concarnatio* (the union of two in one flesh) with a third party. This would occur in the case of either remarriage or fornication. The only exception to the prohibition of divorce is that a person may divorce his spouse on the ground of adultery, for in that case she is already culpable of the crime and her spouse cannot be accused of making her prone to it. Tertullian gets this argument from Matthew 5:32. From this point of view there can be no question, whatever the ground, of being so released from marriage that one is free to remarry. Even a man who has dismissed his wife by a valid divorce on the ground of fornication is still married to her.

Augustine will later teach the same doctrine, but I believe that in Tertullian's case it springs from a peculiar view of marriage that he owes to his Montanism. This source is at first obscured by his emphasis on the union in one flesh, for one might reasonably suppose that death destroys this kind of union. When a couple marry, he maintains, there is a *concarnatio*: that is, they become two in one flesh. In the case of Christian marriage, God either joins them together or, if they have already

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<sup>56</sup> "Adulteratur . . . qui aliam carnem sibi immiscet super illam pristinam quam Deus aut coniunxit in duos aut coniunctam deprehendit." Cf. 9.4, p. 170: "Matrimonium est, cum Deus iungit duos in unam carnem aut iunctos deprehendens in eadem carne coniunctionem signavit." Regarding the sealing of the union, cf. *Ad uxorem* II.8.6, *CCL* 1, p. 393: "[matrimonium] quod . . . obsignat benedictio."

<sup>57</sup> *De monogamia* 9.6–7, p. 172.



come together, "seals" their union (in other words, blesses it). I take it that the latter circumstance occurs when the couple married before they became Christians, although Tertullian could have in mind a pre-marital sexual relationship. (The neologism *concaratio*, for all its air of technicality, blurs the distinctions between a marriage, a sexual relationship, and sexual intercourse.) From the Christian point of view, the subsequent *concaratio* of either spouse with a third party is adultery. Tertullian defines marriage and adultery in the following way:

Let us see what marriage is in the eyes of God, and by this means we shall understand what adultery is as well. There is marriage when God joins two persons in one flesh or, finding them already joined, seals their union in the same flesh. There is adultery, however the two persons may have been separated, when some other, alien flesh is mingled [with either of them], a flesh of which it cannot be said: "This is flesh from my flesh and this is bone from my bones" [Gen. 2:23]. For it is as true now as it was then that once this has been said and done, one may not unite with another flesh.<sup>58</sup>

Although any subsequent mingling with alien flesh is adultery, however, this is not strictly because it is a violation of an existing "concaration" or union in one flesh. For it is adultery, according to Tertullian, even if the other spouse has died. In the *Adversus Marcionem*, as we have seen, Tertullian affirms that the marriage bond remains in existence unless it has been validly dissolved, and that only in the case of fornication does God separate what he has joined together.<sup>59</sup> The matter appears in a different light in the *De monogamia* because Tertullian posits marriage on two levels, one of them pertaining to this world and the other to the next. A marriage may be dissolved at the former level by death or by divorce; but it always remains at the second level.

Tertullian reveals this aspect of his theory in the context of the passages quoted above. He aims to prove that a woman remains bound to her husband even after his death, and that a widow who remarries commits adultery for this reason. The reason given by Christ himself for the prohibition of divorce

<sup>58</sup> *Ibid.*, 9.4, pp. 170–72.

<sup>59</sup> *Adv. Marcionem* IV.34.4–5, *CCL* 1, p. 635: "... inlicitae enim dimissam pro indimissa ducens adulter est. Manet enim matrimonium quod non rite diremptum est; manente <autem> matrimonio nubere adulterium est." *Ibid.*, IV.34.6, p. 636: "... praeter ex causa adulterii nec creator disiungit quod ipse scilicet coniunxit...."

is twofold: first, because "from the beginning it was not so;" second, because "what God has joined together man shall not separate." The only agent who has the right to separate is the one who joins together, namely God himself. God does not separate by the harsh means of divorce,<sup>60</sup> which he prohibits (except in the case of fornication), but he does separate by death. Nevertheless, once a person has married, any carnal union with a third party is adultery, regardless of whether she has separated from her husband by divorce or by death.<sup>61</sup>

It may seem that if God separates in death but does not separate in divorce, remarriage ought to be permissible after death but not after divorce. Tertullian's bases his first argument against the marriage of a widow not on her union to her husband but on her obligation to act in accordance with God's will. If man should not separate what God has joined, neither should man join what God has separated, and the widow has become separated from her husband by God's will.<sup>62</sup> But this is not Tertullian's only argument. Even though he affirms that man *ought* not to separate husband and wife, he does not maintain that man *cannot* do so. On the contrary, he is able to accept, on one level, the reality of divorce. Tertullian says that a woman who has fallen out with her husband and has divorced him has been "separated from him in body and soul."<sup>63</sup> But from the fact that she is no longer united in body and soul to her husband it does not follow that she is free to remarry. It was to prevent persons from exposing their spouses and themselves to this risk that Jesus prohibited divorce.

At one point in his treatment Tertullian seems to accept that neither the divorced woman nor the widow remains bound to her husband. Whether it is divorce or death that dissolves a marriage, the woman is no longer tied to her husband precisely because the bond that tied them together has been dissolved. If she remarries in either case, she sins against herself, for as St Paul says, "he who commits adultery sins against his own body."<sup>64</sup> But the woman is bound to her husband in another sense, for they will remain specially related to one another in

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<sup>60</sup> "... non per duritiam repudii..." . The word *duritia* is an allusion to Jesus' dictum: "Moyses ad *duritiam* cordis vestri permisit vobis dimittere uxores vestras" (Matt. 19:8).

<sup>61</sup> *De monogamia* 9.1-4, pp. 168-70.

<sup>62</sup> 9.2, p. 170.

<sup>63</sup> *Ibid.*, 10.2, p. 174: "et anima et corpore separata est."

<sup>64</sup> 9.5, p. 172.

the world to come. Even if the woman and her husband are in a state of discord before his death, there remains a case to be settled by God. Moreover, we shall be bound to give an account of ourselves to each other after the resurrection. It is true that there will be no marriage as such (Matt. 22:30), but although marriages will not be restored in the hereafter, the spouses will remain bound to one another, for in that better state there will be a higher, more spiritual companionship and we shall continue to know both ourselves and our companions.<sup>65</sup>

As Paul Matthei has pointed out, Tertullian posits some profound bond that persists even after the life-sharing union (what Matthei calls *la communauté de vie*) has been dissolved, but he never explicitly says what is the nature of this bond. Matthei suggests that the persistence is due to the fact that God himself has bound the couple together.<sup>66</sup> The suggestion is a good one, for Tertullian emphasizes that God joins each Christian marriage and seals it with his blessing,<sup>67</sup> but I suggest that the bond is permanent, in Tertullian's view, because it is eschatological, looking beyond this world to the next. In the next world we shall retain the identities we have acquired in this. We shall remain who we are, and who we are depends upon what we have done and have become. In that sense a man's wife will always be his wife, even after divorce and after death.

From this perspective, remarriage in any circumstance whatsoever is necessarily adultery, but not because of the union that husband and wife share in this life, nor because they are one "in body and soul." Rather, it is because of a spiritual and eschatological tie. The prohibition of remarriage is not dependent on the premise that marrying again would violate the spouses' life-sharing union or their mutual possession of each other bodies, for the prohibition survives the death of either partner. The widow is not obliged to live with the deceased, but she is still his wife.

Tertullian posits a marriage bond that is spiritual and everlasting. This conception is congruent with the way in which he assimilates the monogamy of husband and wife to the monogamy of Christ and the Church. The former was the prototype of

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<sup>65</sup> 10.3–6, pp. 174–78.

<sup>66</sup> See "Le divorce chez Tertullian," *Revue des Sciences religieuses* 60 (1986), p. 213; and SC 343 (Tertullian, *Le mariage unique*), pp. 79–80.

<sup>67</sup> See *Ad uxorem* II.8.6, CCL 1, p. 393; *De monogamia* 9.4, ed. Mattei, SC 343, p. 170; and *ibid.*, 9.6, p. 172.

the latter, and the latter is the exemplar of the former. So closely does Tertullian relate the two unions that he writes in the *Exhortation to Chastity* as if they were two manifestations of the same principle. He argues that by interpreting the dictum "they will be two in one flesh" as a reference to the spiritual marriage between the Church and Christ, St Paul showed that the law of *monogamia* or *unum matrimonium* was observed both in the foundation (*fundamentum*) of human kind and in the mystery (*sacramentum*) of Christ. In this way the Apostle restated and emphasized the law of monogamy. Whether we look to our carnal origins in Adam or to our Spiritual origins in Christ, we find that we came from a monogamous union (*monogamia*).<sup>68</sup>

In retrospect, what is most striking about Tertullian's treatment of marriage and remarriage is its similarity to Augustine's. Both insist that the bond of marriage survives the divorce and separation of the couple, even when the divorce is valid. The life-sharing union may be over, but there is still a marriage. Both men emphasize the assimilation of marriage to the union between Christ and the Church. But Augustine, unlike Tertullian, accepted the orthodox doctrine that the ties of marriage do not survive the death of either partner. The notion of the marriage bond, I suggest, originated in Tertullian and was a product of Montanist eschatology.

#### *Jerome*

Amandus, a priest of Bordeaux, attached the following note to a letter to Jerome:

Ask him [Jerome] . . . whether a woman who has left her husband because he was an adulterer and a sodomite, and who has been forced to marry another man, may remain in communion with the Church without doing penance while the man whom she left is still alive.<sup>69</sup>

This anguished message had probably come from the woman herself, who is not named. She seems to have assumed that she should not have remarried. Her question amounts to this: does that fact that she was *forced* into the second marriage excuse her, so that she need not do penance? It should be remembered that penance in this era was a drastic measure:

<sup>68</sup> *De exhortatione castitatis* 5.3–4, ed. Moreschini, SC 319, p. 88.

<sup>69</sup> *Epist.* 55, 4(3), CSEL 54, p. 492. The letter is usually attributed to the 390s. It was apparently written before the *Commentary on Matthew* (AD 398), to which it makes no reference.

the Church excommunicated the penitent, and the penance was long, arduous and public.

Jerome's response appears in a letter written at some time before AD 398. If the woman expected sympathy and understanding, she was looking for it in the wrong place. Jerome is reminded of Psalm 140:4, which refers to those who make excuses for their sins. Being human we are inclined to tolerate our own vices and to attribute to the "necessity of nature" what we are really doing by our own volition. It is as if a young man were to attribute his promiscuity to the condition of his body, or a murderer were to excuse himself on the grounds that he killed to escape cold and hunger.

Jerome says that the woman should be obedient not to his own judgment but to that of St Paul: she is bound to her husband as long as he lives (cf. Rom. 7:1-3, 1 Cor. 7:39). The Apostle leaves no room for excuses of any kind. Even if a woman leaves her husband because he is guilty of adultery or of sodomy or of anything else, he is still her husband and she cannot marry another as long as he is alive. Paul was not speaking on his own authority but on Christ's, for this is what Christ himself teaches in Matthew 5:32. The disciples themselves understood what a heavy burden marriage was when they said: "If it is thus, it is not expedient for a man to take a wife" (Matt. 19:10).<sup>70</sup>

Jerome adds that he is not sure what the note means when it says that the woman was *forced* to marry another man. In any case, even if she was abducted, and the force used was such that she was not able to resist it, why has she not divorced her abductor? If she failed to put up sufficient resistance, she is guilty of adultery herself, as she may discover in the writings of Moses (Deut. 22:23-24). One cannot drink both from the Lord's cup and from the cup of devils (1 Cor. 10:21). What fellowship can there be between light with darkness? What agreement is there between Christ and Belial (2 Cor. 6:14-15)? She must certainly do penance, but this will be to no avail unless she at least abstains from sexual relations with her second husband (who is not really her husband at all but an adulterer). If she finds this too hard, she is preferring her sexual pleasure to the Lord.<sup>71</sup>

In the course of his eulogy for Fabiola (written in AD 400), Jerome had to deal with the fact that she too had left her first

<sup>70</sup> *Ibid.*, pp. 492-93.

<sup>71</sup> *Ibid.*, 5(4), p. 494.

husband and married another while the former was still alive.<sup>72</sup> Although his stance regarding matters of principle and doctrine is the same as in the letter to Amandus, the tone of his response could hardly be more different. While in the former letter he disdains those who make excuses for their sins, in the latter he is eager to defend and excuse Fabiola as far as possible and to remove any suspicion of a stain upon her character. And while in the former he disdains those who attribute their crimes to the "necessity of nature," in the latter, while admitting that Fabiola was at fault in not remaining unmarried, he pleads in mitigation that she was driven by "necessity" and was mindful that it is better to marry than to burn.

It was, it seems, common knowledge that Fabiola's husband was not only an adulterer but utterly depraved. Jerome says that even a prostitute or a slave would not have tolerated him. The Lord himself commands that "a wife should not be dismissed except on the ground of fornication, and that if she has been dismissed she should remain unmarried."<sup>73</sup> Since *the same rules must apply to women as to men*, Jerome argues, Fabiola was right to leave her husband.

Although Fabiola was acting in accordance with Jesus' precept in leaving her husband, she acted in a way contrary to the same precept when she married again. In the second part of his defense, Jerome admits her guilt but presents a case for mitigation:

If, however, the accusation is made against her that having repudiated her husband she did not remain unmarried, I freely admit her guilt, but I appeal on the ground of necessity. "It is better to marry," the Apostle says, "than to burn" [1 Cor. 7:9]. She was still very young, and unable to persevere in widowhood. She experienced a law in her members struggling against the law of her mind [cf. Rom. 7:23], and she found herself being overcome and dragged as a captive to sexual intercourse. Therefore she judged that it was better to confess her weakness openly and submit to the shadow, as it were, of an unworthy marriage than to present the appearance of an *univira* while leading the life of a courtesan.<sup>74</sup>

<sup>72</sup> *Epist.* 77 (*Ad Oceanum*), 3, CSEL 55, pp. 38–40.

<sup>73</sup> *Ibid.*, p. 39. Jerome ascribes all this to the "Lord" (i.e., Jesus), but part of it comes from St Paul.

<sup>74</sup> *Ibid.*, pp. 39–40: "quam sub gloria univirae exercere meretricium." An *univira* was a woman who had had only one husband, and who had remained faithful to him even if he had died. The *univira* was the ideal of womanhood in Roman society. Cf. *Inscriptiones Latinae Selectae*, ed. Dessau (1902), vol. 2, n. 8444: "Postumia Matronilla incomparabilis coniux, mater

Jerome likens Fabiola's condition after she had left her first husband to widowhood. He appeals to 1 Timothy 15:14–15, according to which young widows should marry, have children and look after their homes rather than leave themselves exposed to the wiles of Satan.

Jerome concludes his defense by arguing that Fabiola was acting from the best of motives and in ignorance of the full rigour demanded by the Gospel:

Fabiola had persuaded herself and believed that she had acted according to her rights in dismissing her husband. She did not know the severity of the Gospel,<sup>75</sup> according to which every ground for remarrying is taken away from women as long as their husbands are alive. Thus it was that she who had fended off many of the Devil's blows was caught unawares and received this single wound.

Jerome was able to present a strong case in defense of Fabiola, and on grounds that were convincing both pastorally and scripturally. Paul treated marriage as a means to escape the problems presented by sexual desire and to avoid exposing one's self to Satan. Jerome was especially taken with this idea, as is apparent in his treatise against Jovinian: he saw marriage as something undesirable in itself but good insofar as it provided a defense against things that were even worse. It was a vile medicine. The example of widowhood was highly pertinent: the widow was to remain unmarried, other things being equal; but she might remarry if her sexual appetites would otherwise have provided Satan with a means of temptation. Of themselves these powerful and well-founded pastoral arguments would have justified Fabiola's second marriage. Set against them there was just this: that Jesus had forbidden any person who had separated from his spouse, even if he had done so on the ground of fornication, to remarry. This is the severity of the Gospel of which Fabiola was not yet aware. Jerome made no attempt to justify the rule on pastoral or utilitarian grounds. There is no suggestion that Fabiola would have been better off personally or even spiritually had she remained unmarried: on the contrary, Jerome's argument implied that she would have been wretched and even prone to Satan.

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bona, avia piissima, pudica religiosa frugi efficax vigilans sollicita *univira* unicuba totius industriae et fidei matrona. . . ." (See also nn. 8430, 8450, 8394.)

<sup>75</sup> The text has "nec evangelii vigorem novemat" (p. 40, line 5); I assume that Jerome intended *rigor*, not *vigor*.

Jerome's treatment of Fabiola's remarriage in the letter to Oceanus can be looked at from more than one point of view. The position he outlined was what we have come to regard as normative and orthodox, but Jerome said that the issue of her divorce and remarriage had met with a "storm of detractors" (*procella obtrectatorum*). His aim was to defend Fabiola against the many in Rome in whose eyes her behaviour was scandalous.<sup>76</sup> What can be gleaned from Jerome's defense regarding the position of these detractors? I suggest that what had seemed scandalous was that a *woman* should have divorced and remarried. The standard by which they had found her behaviour wanting was the same as that which one finds in Ambrosiaster: namely, that although a man might divorce his wife for adultery and thereby be free to remarry, a woman did not have this right.

Jerome might have argued simply that since her husband was guilty of fornication, Fabiola was free to divorce him, but that she was not free to remarry. In fact his line of defense was more complex. First, he pointed out that her husband's behaviour had been so bad that even a slave or a prostitute would not have tolerated him. Even those who denied that a woman had the right to divorce her husband on the ground of fornication would have accepted that her continuing to live with her husband might, under extreme circumstances, become intolerable. But having left him, she should remain unmarried (as Paul demanded in 1 Cor. 7:11). Second, Jerome cited the Lord's precept that a wife should not be dismissed except on the ground of fornication, and that if she has been dismissed she should remain unmarried. He then argued that whatever precepts applied to men had to apply equally to women. The law of Caesar and Papinian permitted the husband to fornicate with impunity, the law of Christ and St Paul did not. Jerome assumed that the detractors would have permitted men to divorce their wives for adultery, but he opposed their double standard. As a reformer, he saw their conservative Christian position as a compromise with the ways of the world. Third, he conceded that they were right to object to her remarrying. She should have remained unmarried. Here Jerome had to separate the issue of divorce from that of remarriage. The detractors assumed that one who divorced a spouse validly was free to remarry. Jerome argued that remarriage was forbidden even in this case.

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<sup>76</sup> *Epist.* 77.3, *CSEL* 55, p. 38–40.



In these letters, Jerome simply assumes that the law of Gospel permits divorce on the ground of fornication but prohibits remarriage. In his commentary on Matthew's gospel (dated AD 398), however, Jerome attempts to explain and to prove the rule. Curiously, he does not advert to the exceptive clause when he comments upon Matthew 5:32.<sup>77</sup> His only concern there is with Jesus' statement that Moses permitted divorce because of the hardness of men's hearts. His treatment of divorce on the ground of fornication takes the form of a gloss on Matthew 19:9. Jerome does not offer a detailed analysis or exegesis of this text. Nor does he attempt to show how the absolute prohibition of remarriage after divorce to which he adheres can be squared with the text. Rather, he tries to explain why divorce is permitted on the ground of fornication and why remarriage is prohibited.

The husband of an adulteress, Jerome argues, may and indeed ought to divorce her because her adultery vitiates both the *affectus* or marital regard that is the essence of marriage and the union in one flesh:

The only thing that overcomes a wife's marital relationship [*affectus*] is fornication. Indeed, since she has divided up the "one flesh" into another and by fornication has separated herself from her husband, she ought not to be kept by her husband lest she brings the malediction upon him as well, for as Scripture says, "he who keeps an adulteress is foolish and wicked" (Prov. 18:22). [Therefore] wherever there is fornication and the suspicion of fornication, the wife is freely dismissed.<sup>78</sup>

Strictly, it seems, the husband of an adulteress ought to dismiss her, although when Jerome says that the man dismisses his wife "freely" (*libere*), he may imply that the man is not obliged to divorce her. Much would depend, no doubt, upon whether she persisted in her crime or repented, although Jerome does not advert to this.

Although he says in his letter to Amandus that the husband of the woman in question is not really her husband at all, but only an adulterer, the argument here seems to presuppose that a spouse's adultery, by violating and vitiating marital affection and the union in one flesh, in some sense dissolves the marriage. There is no indication of any *vinculum* that survives separation. Remarriage is prohibited, not because men

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<sup>77</sup> *Commentariorum in Mattheum* I, 5:32, CCL 77, p. 32.

<sup>78</sup> *Ibid.*, III, 19:9, p. 167.

remain in some way married to their divorced wives, but to prevent false accusations of adultery:

And because it could happen that a husband would falsely accuse an innocent woman, imputing a crime to his former wife in order to marry again, he is commanded to dismiss the first woman in this way: that he should not have a second wife as long as the former is alive.

Jerome supports this argument with another of a more rhetorical nature:

What [Christ] says is like this: if you dismiss your wife not because of lust but because of the wrong [*iniuria*] that she has done, then why, having experienced an unhappy first marriage, would you subject yourself to the danger of a second?

Jerome's pessimistic view of marriage begins to become evident at this point. The reasoning that he imaginatively attributes to Christ might be summed up in the maxim "once bitten, twice shy." In his letter to the widow Furia, in which he commends her decision not to marry again after her husband's death, Jerome rejoices that she has not behaved in the way described in 2 Peter 2:22: "The dog turns back to his own vomit, and the sow is washed only to wallow in the mire."<sup>79</sup> But this line of argument can prove at most that remarriage is imprudent. It cannot provide a sufficient reason for the prohibition of remarriage, for the latter obtains (in Jerome's view) only as long as the adulteress is alive. Jerome adds, as a corollary to his demonstration, that the same rules must apply in the case of a woman whose husband is an adulterer:

Likewise, because it could happen that a woman also might repudiate her husband according to the same law, she is commanded by the same warning not to marry another man [cf. Mark 10:12].

Finally, Jerome explain why Jesus adds in Matthew 19:9 that a man who marries a divorced woman commits adultery:

And because a woman who is a harlot and who has once been an adulteress does not fear opprobrium, the second man is commanded that he is guilty of adultery if he marries a woman of this kind.

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<sup>79</sup> *Epist.* 54, 4, *CSEL* 54, p. 469.

*Augustine*

Augustine's treatise *On Adulterous Marriages*, dated AD 419, consists in his responses to a man called Pollentius. The treatise is in two books. In Book I, the central issue is Pollentius's interpretation of a statement by St Paul: namely, that the wife must not separate from her husband, but that if she does separate, she must remain unmarried or else be reconciled with him (1 Cor. 7:10–11). Pollentius supposed that women as well as men were permitted to remarry after divorce on the ground of fornication. This he learned from Matthew 19:9. He maintained for this reason that those women to whom Paul refers, who must remain unmarried or be reconciled with their husbands, were wives who had left their husbands without the justification of fornication (*sine causa fornicationis*). Furthermore, he suggested that women were permitted to leave their husbands for the sake of observing continence, and this even without their husbands' consent. Paul's prohibition would apply to a woman in this position. Augustine maintains, on the contrary, that Paul is referring to women who have left their husbands on the ground of fornication. Except on this ground, a wife may not leave her husband at all, let alone remarry.<sup>80</sup>

Pollentius's interpretation of Scripture is a little eccentric, and he was not (as far as we can gather) in Augustine's class as an exegete. Nevertheless, his suggestions were acute enough to require Augustine to provide a detailed exegesis of the Pauline text and to grapple with the problem of Matthew 19:9. Augustine is respectful toward his interlocutor and freely admits the difficulties involved. In the *Retractationes*, written some eight years later, Augustine says that he wrote the treatise against Pollentius "to solve a most difficult question." He doubts that he has solved all the problems involved and admits that he had not "arrived at the perfection of this matter," but he claims that he has sufficiently exposed the fundamentals of the issue for the intelligent reader to work out the truth for himself.<sup>81</sup> This supposition is unduly optimistic.

Augustine takes two fundamental premises as given. The first is that the same rules must apply to men as to women.<sup>82</sup> It is necessary for him to point this out because of the "exclusive

<sup>80</sup> *Ad Pollentium de adulterinis coniugiis* I.1(1), CSEL 41, pp. 347–48.

<sup>81</sup> *Retractationes* II.57(83), CCL 57, p. 136.

<sup>82</sup> See esp. I.8, p. 355. See also *De sermone domini in monte* I.16(43), CCL 35, pp. 47–49.

language" of the texts under discussion (Matt. 19:9 and 1 Cor. 7:10–11), although Pollentius and Augustine seem to have been in agreement on this point. The second premise is that Jesus affirms unequivocally that a man may divorce his wife only on the ground of fornication and even then cannot remarry. Augustine presumes that this has been demonstrated in his commentary on the Sermon on the Mount, and in particular in his treatment there of Matthew 5:32.<sup>83</sup>

Pollentius's interpretation of 1 Corinthians 7:10–11, Augustine argues, is unacceptable on two counts. First, Pollentius presupposes that a woman might leave her husband in order to remain continent, and this even without his consent. But Paul says in 1 Corinthians 7:2–4 that each partner owes his or her conjugal rights to the other, and that spouses should practise abstinence only by mutual agreement and for a short time. The woman who separates from her husband in this limited sense cannot be properly described as "unmarried" (*innupta*). Second, we know from Matthew 5:32 that a woman is permitted to separate fully and permanently from her husband only if her husband commits adultery. Then she really does become "unmarried," for her divorce releases her from the conjugal debt.<sup>84</sup>

Pollentius's interpretation of 1 Corinthians 7:10–11, therefore, is mistaken. But how should one interpret it? Augustine finds that the text seems at first sight to be paradoxical or self-contradictory. Only by assuming that there is an ellipsis and by supplying the missing element can one make sense of it. The passage includes two precepts, namely: (v. 10) that the wife should not separate from her husband; and (v. 11) that if she does separate, she must either remain unmarried or else be reconciled with her husband. The second precept (v. 11), by allowing the wife to remain unmarried after separation, seems to presuppose that she may do what the first precept says she cannot do, namely separate from her husband. Augustine deduces that there must be some exception to the first precept, and that the second precept applies in this exceptional circumstance. Matthew 5:32 provides the exception. Augustine's interpretation may be summarized by expanding the Pauline text in the following way: "To the married I give charge, not I but the Lord, that the wife should not separate from her husband except on the ground of fornica-

<sup>83</sup> See esp. I.1, pp. 347–48, and I.8, p. 355.

<sup>84</sup> I.2, pp. 348–49.

tion, and if she separates on this ground she must either remain unmarried or be reconciled with her husband."<sup>85</sup>

This interpretation is less than convincing for two reasons. First, there is no reason to suppose that Paul had this, or any other, particular exception in mind. If he had thought that there was a specific exception to the prohibition against divorce he would surely have mentioned it. Second, Augustine's premise that the text is *prima facie* paradoxical is only sound if one assumes that v. 10 strictly forbids the woman to leave her husband, but it is not clear that this is so even if one interprets the text literally, for the verb *praecipere* (in the phrase: "praecipio . . . non discedere") could mean "advise", "teach", "instruct", "admonish" or "warn." There would be nothing self-contradictory or paradoxical about the admonition: "You should not separate from your husbands, but, if you do, you must remain unmarried."

Augustine's source for the premise that separation is forbidden except on the ground of fornication is Matthew 5:32. But what of Matthew 19:9: "whoever divorces his wife except on the ground of fornication and marries another commits adultery"? Does this not imply what Pollentius proposes in regard to the Pauline text: namely, that the man who remarries after divorcing his wife on the ground of fornication does *not* commit adultery? Augustine asks himself why, if remarriage while one's spouse lives is always adultery, regardless of whether or not she herself committed fornication, did Christ not omit the exceptive clause and give the simple precept: "whoever divorces his wife and marries another commits adultery"?

Augustine argues that by adding the exceptive clause, Christ does not mean that a man who dismisses his wife on the ground of fornication and remarries does not commit adultery, but rather that his adultery would be greater if his wife were not a fornicator. In other words, remarriage after divorce on this ground is *less adulterous* than remarriage after divorce on other grounds or in other circumstances:

"If he too is an adulterer who marries another woman after dismissing a wife who has committed fornication, then why," you ask, "did the Lord place in the middle [of his dictum the exceptive clause about] the ground of fornication, rather than make the general statement: 'whoever dismisses his wife and marries another woman commits adultery'?" I believe that it

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<sup>85</sup> I.3, p. 350.

was because the Lord wished to make clear which is greater. For who would deny that it is a greater kind of adultery to marry again after dismissing a wife who was not fornicating than to dismiss a wife who was fornicating and then marry again? He did not mean that remarriage after divorcing a wife who was fornicating was not adultery, but that it was less so.<sup>86</sup>

Augustine also argues that in Matthew 19:9 Jesus only says what happens when the wife has *not* committed fornication, and that he remains silent about what is the case when the wife *has* committed fornication. Mark 10:11–12 and Luke 16:18 solve the ambiguity, for these texts make it clear that a man who dismisses his wife and marries another woman always commits adultery, regardless of the grounds upon which he divorced his wife.<sup>87</sup>

Augustine notes that there are several versions of the exceptive clause in Matthew 19:9. He prefers *praeter causam fornicationis* to variants such as *excepta causa fornicationis* and *nisi ob causam fornicationis* because it seems to lessen the undesirable implication.<sup>88</sup> (The clause might then be translated: “whoever dismisses his wife on grounds other than fornication and marries another woman commits adultery.”) But while these may lessen the unwanted implication, they do not remove it. In fact Augustine does not deny that the exceptive clause in Matthew 19:9 seems to imply that remarriage after divorce on the ground of fornication is not adultery. His case in the final analysis is that Matthew 19:9 is a difficult text, and that Matthew 5:32, Mark 10:11–12 and Luke 16:18 contradict its apparent sense. It cannot mean what it seems to mean.

In the second book of the treatise Augustine reaffirms that remarriage after a valid divorce on the ground of fornication is adultery, and he deduces from this that divorce cannot dissolve the bond (*vinculum*) of marriage.<sup>89</sup> The bond is like the *sacramentum* of regeneration imposed in baptism. Neither infidelity nor even valid divorce can remove it:

Just as the sacrament of regeneration remains in someone who

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<sup>86</sup> I.8, p. 355.

<sup>87</sup> I.10, and ff., pp. 357 ff.

<sup>88</sup> I.11–12, pp. 358–60. Augustine states that his preferred variant is the correct translation of the Greek. Thus it seems that his Greek text had *parektos logou porneias* (as in Matthew 5:32) and not *ei mē epi porneia* (= *nisi ob fornicationem*).

<sup>89</sup> II.3, p. 385: “non est coniugali vinculo per mulieris adulterium iam soluto.”

has been excommunicated for a crime, and is always with him even if he is never reconciled with God, so also the bond of the marital compact [*vinculum foederis coniugalis*] remains in a wife who has been divorced on the ground of fornication, and is always with her even if she is never reconciled with her husband. . . .<sup>90</sup>

This analysis, with its comparing of marriage to baptism, is an extension of one Augustine uses elsewhere. In other cases, the divorce in question is invalid. One may liken it to apostasy. Here Augustine argues that the *vinculum* of marriage remains even after a valid divorce, and he likens valid divorce on the ground of fornication to excommunication. The innocent party does not simply leave his or her spouse. Something more active and more complete is involved. Just as the Church cuts a heretic off from her society, so may someone cut an adulterous spouse off from marriage. The *societas* between husband and wife is annulled. Nevertheless, some bond remains between them.

The logic of Augustine's treatment should be clearly understood. His premise, which he claims to find in the Bible, and in particular in the precepts of Christ, is that remarriage after divorce on the ground of fornication is adultery. From this he deduces that divorce on the ground of fornication does not dissolve the marriage bond. Adultery is epistemologically prior to the survival of the bond, but it is causally posterior to it, for remarriage is adultery *because* the bond remains. The pattern of explanation comes from the gospels, in which Jesus maintains that a man cannot leave his wife and marry another *because* he is bound to her. The husband is bound to his wife by their life-sharing union. As St Paul says, each has power over the body of the other. Augustine believes that divine law forbids remarriage even when a valid divorce has dissolved the life-sharing union and the obligation to live together, but he retains the pattern established by the Gospel inasmuch as he maintains that a bond (a *vinculum*) survives despite the divorce.

The crux and premise of Augustine's argument is the thesis that a person who divorces his spouse for adultery and remarries commits adultery. This thesis depends tenuously upon 1 Corinthians 7:11, but it runs contrary to the apparent sense of Matthew 19:9, as Augustine himself recognized. He found

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<sup>90</sup> II.4, p. 386.

it difficult to interpret the Matthean exceptive clause in a manner consistent with his own doctrine, and his argument involving degrees of adultery is unconvincing. While on the one hand this shows us that his doctrine was not the inevitable product of Scripture, it shows us on the other hand how deeply convinced Augustine was that his doctrine was correct.



## CHAPTER NINE

### THE MATTHEAN EXCEPTION AND THE DOCTRINE OF INDISSOLUBILITY

#### *The triumph of the strict interpretation*

By the year 419, a person in Augustine's diocese who divorced his spouse and married another woman was excommunicated as an adulterer. The Church might receive him again after penance, but only if he relinquished the second woman. We know this because Augustine, in response to Pollentius, dealt with objections to the regime and explained why it was just.<sup>1</sup> Since the main point of this treatise was that remarriage was really adultery even after divorce on the ground of fornication, we know that the Church in North Africa made no exception in the case of a person who validly divorced his spouse on this ground. A canon from the Council of Carthage in AD 407 may be another witness to this regime.<sup>2</sup> Augustine would have been present at the council as Bishop of Hippo. As we have seen, Jerome, in his letter to Amandus, maintained that the woman who had left her adulterous husband and remarried could not satisfy by penance unless she at least abstained from sexual relations with the second man.<sup>3</sup>

The position of Pope Innocent I regarding divorce and remarriage was remarkably similar to Augustine's. Among the questions put to him by Exsuperius, Bishop of Toulouse, was one pertaining to those "who after a repudiation has taken place join themselves in marriage to others." In his letter of AD 405, Innocent replied:

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<sup>1</sup> *De adulterinis coniugiis* II.15–16, pp. 400–02.

<sup>2</sup> Dionysius Exiguus, *Registrum Ecclesiae Carthaginensis* 102, in Munier (ed.), *Concilia Africae*, CCL 149, p. 218: "De his qui uxores aut quae viros dimittunt, ut sic maneant. Placuit ut, secundum evangelicam et apostolicam disciplinam, neque dimissus ab uxore, neque dimissa a marito, alteri coniungatur, sed ita maneant, aut sibimet reconcilientur; quod si contempserint, ad paenitentiam redigantur. In qua causa legem imperialem petendam promulgari." In the Hispana, the decree is attributed to the Council of Milevis (AD 416), canon 17: see Munier (*ibid.*), pp. 325 and 366.

<sup>3</sup> *Epist.* 55, 5(4), CSEL 54, p. 492.

Any man who hastens to marry again while his wife is alive, even though his marriage seems to have been broken up [*quamvis dissociatum videatur esse coniugium*], cannot but be considered an adulterer, to the extent even that the person to whom he has become joined will also be considered to have committed adultery. This is in accordance with what we read in the Gospel: "whoever divorces his wife and marries another commits adultery" [Matt. 19:9]; and similarly "whoever marries a divorced woman commits adultery" [Matt. 5:32]. Therefore all such persons must be deprived of communion with the faithful.<sup>4</sup>

According to this ruling, any person who divorces his spouse and remarries commits adultery, and the person, whether married or unmarried, who marries the divorcee also commits adultery. Innocent finds proof for the first proposition in Matthew 19:9 and for the second in Matthew 5:32. He considers that the divorcees are really still married even though their marriage appears to have ended. In other words, the interior bond remains even though the exterior association has ceased. For this reason, the divorcee who remarries while his or her spouse is still alive commits adultery. The sex of the one who divorces and remarries is immaterial, for Innocent applies Matthew 5:32, which refers to a female divorcee, to the case of male divorcees. Moreover, the prohibition applies equally to the repudiating partner and to the repudiated partner. Innocent must have ruled out remarriage after a valid, Christian divorce on the ground of fornication, as well as remarriage after civil divorce, for although he omits the exceptive clause in quoting Matthew 19:9, if he had supposed that there was an exception to the rule, he would surely have mentioned it.

Innocent's position in this matter, as in others, was in line with the position of the Church of North Africa. There is little evidence that a man who divorced his wife on the ground of fornication was prohibited from marrying again in any other province of the Western Church before the Carolingian period. The Council of Angers in AD 453 decreed that men who "abuse the name of marriage" with the wives of other men while their husbands are still alive should be excommunicated,<sup>5</sup>

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<sup>4</sup> Innocent, *Epist.* 6.6.12, *PL* 20:500–501. Innocent's response is quoted in the following: Pope Stephen II (752–57), *Resp.* 5, *PL* 89:1025A–B; Jonas of Orléans *De institutione laicali* II.13, *PL* 106:192B; and Benedictus Levita III.73, *PL* 97:808A.

<sup>5</sup> *Conc. Andegavense* 6, *CCL* 148, p. 138: "Hi quoque qui alienis uxoribus, superstitionibus ipsarum maritis, nomine coniugii abutunter, a communione habeantur extranei."

but there is no indication that the women in question had been divorced on the ground of fornication. Decrees of the councils of Vannes and Agde in the late fifth and early sixth centuries, as we have seen, suggest that men who could prove that their wives were guilty of adultery could remarry without being excommunicated.<sup>6</sup> A decree on remarriage from the Council of Soissons in 744, which was convened under Pepin's auspices, is at best ambiguous regarding the Matthean exception. Having stated that a man should not remarry as long as his wife is alive, and that a woman should not remarry as long as her husband is alive, it adds that this is because a man may not dismiss his wife except on the ground of fornication.<sup>7</sup>

Although the Augustinian position is not the only one that we find in early medieval sources, it became a cornerstone of the Carolingian reforms, and by the twelfth century it had triumphed throughout the Western Church.

The decree of Carthage (AD 407) prohibiting the remarriage of divorcees was influential in the eighth century. Pope Zacharias quoted it in a rescript to Pepin *circa* AD 747,<sup>8</sup> and a version taken from the Dionysio-Hadriana collection appears both in Charlemagne's *Admonitio generalis* of AD 789 and in his *Capitulare missorum* of AD 802.<sup>9</sup>

Theodulf of Orléans (d. 818), a member of Charlemagne's court, set out the rules in unambiguous detail:

If a man's wife commits adultery, and he has discovered this and made the fact public, he may divorce her, if he wishes, on the ground of fornication. The woman . . . should do penance. Her husband, however, is not free to marry another woman under any circumstances. He is free, if he so wishes, to reconcile the adulteress with himself [cf. 1 Cor. 7:11], but on condition

<sup>6</sup> *Conc. Veneticum* (AD 461/491) 2, *CCL* 148, p. 152. *Conc. Agathenses* (AD 506) 25, *CCL* 148, p. 204.

<sup>7</sup> *Conc. Suessionense* (AD 744) 9, *MGH Conc.* 2, p. 35: "Similiter constituemus . . . nec marito viventem sua mulier alius [i.e. nec maritus vivente sua muliere aliam] non accipiat, nec mulier vivente suo viro alium accipiat, quia maritus muliere[m] sua[m] non debet dimittere, excepto causa fornicationis deprehensa." Pepin was still *major-domo* at this time. Cf. Charlemagne's *Admonitio generalis* (AD 789) 43, *MGH Capit.* 1, p. 56: "ut nec uxor a viro dimissa alium accipiat virum vivente viro suo, nec vir aliam accipiat vivente uxore priore."

<sup>8</sup> *MGH Epist.* 3 (*Epist. Mer. et Kar. Aevi* 1), p. 483 (cap. 12). Cf. Zacharias's letter to Boniface about the rescript, in which he said that he had written "simul etiam et pro illicita copula, qualiter sese debeant custodire iuxta ritum christianae religionis et sacrorum canonum instituta" (*ibid.*, p. 349).

<sup>9</sup> *Admonitio generalis* 43, *MGH Capit.* 1, p. 56; *Capitulare missorum item speciale* 22, *ibid.*, p. 103.

that he does penance along with her. Once penance has been done, they may come into the grace of communion. The same applies in the case of a woman: if her husband commits adultery, she has the power to divorce him on the ground of fornication. She must then remain unmarried [*innupta*] as long as her husband lives. For neither the man nor the woman has the power to marry again as long as the former spouse lives. But they do have the power to be reconciled with one another.<sup>10</sup>

In AD 796 or 797, a council convoked by Charlemagne at Friuli, under the direction of Paulinus, Bishop of Aquileia, decreed that:

when a marital bond has been dissolved on the ground of [a wife's] fornication, the husband may not take another wife as long as the adulteress is alive, even though she is an adulteress. As for the adulteress, who ought to suffer severe punishments or the torment of penitence: she may not marry another man regardless of whether her husband, whom she was not ashamed to cheat, is alive or dead.<sup>11</sup>

It appears from the comments added to this decree that the matter had been the subject of searching discussion. Someone must have pointed out that Matthew 19:9 seemed to imply that a man might remarry if he had divorced his wife on the ground of fornication.

According to the report contained in the decree, the bishops agreed that while Jesus permitted a man to dismiss his wife on the ground of fornication, the Gospel did not say that Jesus also permitted such a man to remarry. On the contrary, the Gospel unambiguously prohibited remarriage. An argument seems to have arisen at the council regarding the sense of Matthew 19:9, however, for it was admitted that the phrase *nisi ob fornicationem* is ambiguous. One must obey the Lord's precepts absolutely, but in this case one may reasonably be uncertain as to what the Lord has commanded:

But since the phrase that comes in the middle—that is, “if not on account of fornication”—is ambiguous, it is obviously possible to inquire whether the phrase should be referred only to the freedom to divorce one's wife (“whoever divorces his wife except on account of fornication”) or whether it should be referred also to the freedom to take another wife while the former is alive, as if he had said: “whoever dismisses his wife and marries another, if not on account of fornication, commits adultery.”<sup>12</sup>

<sup>10</sup> *Capitulare*, PL 105:213C–D.

<sup>11</sup> *Conc. Foroiuliense* (AD 796–97) 10, *MGH Conc.* 2, pp. 192–93.

<sup>12</sup> I.e.: “Qui[cumque] dimiserit uxorem suam et aliam nisi ob fornicationem

This argument is obscure, and the suggested re-ordering of Jesus' words can only produce a subtle shift of emphasis, but at least the problem of Matthew 19:9 had come into the open. They solved the problem not by exegesis but by consulting Jerome's commentary on the text in question, which was read out and studied at the council.<sup>13</sup> According to Jerome, Jesus gives license to a man only to divorce his adulterous wife, and not to marry another. The report cites Jerome's explanation of the prohibition against remarriage: namely, that if men were allowed to remarry after divorce on these grounds, they might falsely accuse their wives of adultery in order to take new partners.

The decree also adapts to the same end Jerome's argument that carnal union with a third party vitiates the union of two in one flesh. Jerome argued on these grounds that the adulteress ought to be divorced. The decree takes the argument further and complicates the arithmetic by arguing that the remarriage of the innocent party would make matters worse: the adulteress has already divided the two-in-one into three; if her husband then remarries, he will divide three into four.<sup>14</sup> "As long as the adulteress is alive," therefore, "her husband is not able to contract a second marriage with impunity." Once they had studied Jerome's commentary, it became clear to them that as long as an adulteress was alive, her husband was neither permitted to marry another woman nor able to do so with impunity. We should note that Jerome offers no solution to the exegetical problem of Matthew 19:9. It was Jerome's authority, and not Scripture, that won the day.

Some other sources affirming that remarriage after divorce on the ground of fornication is adultery simply assume without proof that this was the teaching of Jesus himself. Thus the capitula of the Council of Paris in AD 829 determine that "those who dismiss their wives on the ground of fornication and marry others are shown by the Lord's decree [*sententia*] to be adulterers."<sup>15</sup> (The previous capitulum declares that except

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duxerit moechatur," where Matthew has: "Quicumque dimiserit uxorem suam nisi ob fornicationem et aliam duxerit moechatur."

<sup>13</sup> Jerome, *Comment. in Matt.* 19:9 (CCL 77, p. 167).

<sup>14</sup> P. 193, lines 20–23. "Non enim debet imitari malum adultere uxoris, et si illa duo, immo unam carnem per scissuras fornicationem divisit in tres, non decet, ut maritus nequius [*sic*; iniquius?] exsequendo tres dividat in quattuor." Cf. Jerome, *Commentariorum in Matt.* 19:9 (CCL 77, p. 167): "... immo cum illa unam carnem in aliam dividerit et se fornicatione separaverit a marito, non debet teneri ne virum quoque sub maledicto faciat..."

<sup>15</sup> *Conc. Parisiense* (AD 829) 69, *MGH Conc.* 2, p. 671.

in the case of fornication, a wife should not be divorced but tolerated.) The capitula of the Council of Paris were promulgated by Louis the Pious, and the capitula on marriage appear again in the Diet of Worms and in Benedictus Levita.<sup>16</sup> The capitula of Paris also appear as headings or *lemmata* in the *De institutione laicali* by Jonas of Orléans, who presided over the council.<sup>17</sup> Jonas supports the decree by supplying quotations from Jerome (commenting on Matthew 19:9), Augustine (in the *De nuptiis et concupiscentia*) and Innocent I (in the letter to Exsuperius).

Hincmar cites the decree of Carthage in his letter on the affair of Count Stephen of Auvergne (dated AD 860). He also argues that persons who have divorced on account of fornication cannot remarry because of the *sacramentum* of nuptial union. Following Augustine, Hincmar compares the bond of marriage to the sacrament conferred in baptism, for the marriage bond can never be lost once it has been conferred. A couple may separate on the ground of fornication, but if they are united again after the appropriate penance, the marriage bond does not have to be created anew.<sup>18</sup> In Hincmar's view, reconciliation is a religious as well as a domestic matter, and the sinner must be reconciled as a member of the Church before he or she can be reconciled as a spouse. The sacrament in marriage is subordinate as well as analogous to that of baptism. Divorcees must either remain single or else be reconciled, but in the latter case the sinner must first undergo penance. Only after he (or she) has been reconciled with the Church and has returned to the sacrament of eucharist is he ready to return to the *sacramentum* of marriage, the nuptial mystery of which St Paul speaks:

Because of the sacrament of nuptial union, [*sacramentum nuptialis coniunctionis*], a husband and a wife who separate from one another on the ground of fornication will either remain unmarried [*innupti*] until either of them should die, or else strive to be reconciled with one another. But the [marital] reconciliation of the one who has sinned ought to happen after

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<sup>16</sup> For the text in question, see: *Episcoporum ad Hladowicum Imperatorem elatio* (AD 829) 54, *MGH Capit.* 2, p. 46, lines 3–4; *Constitutiones Wormatiensis* (AD 829), *MGH Leges* (folio) 1, p. 345, lines 41–43; and Ben. Lev. II.235, *PL* 97:775. Benedict Levita's source is probably Jonas of Orléans (see below).

<sup>17</sup> For our text, see Jonas of Orléans, *De institutione laicali* II.13, *PL* 106:191–192.

<sup>18</sup> *Epist.* 136, *MGH Epist.* 8 (*Epist. Kar. Aevi* 6), p. 100.

penance and priestly reconciliation, so that the sinner is restored first in the sacrament of the Church and afterwards in the nuptial mystery.<sup>19</sup>

Pope John VIII (AD 872–882) provides a definitive statement of the Western position in its most rigorous form in a rescript to Ethelred, Bishop of Canterbury. He writes:

With regard to those who, you report, have acted in a manner contrary to our Lord's precept by leaving their wives, our ruling is as follows. A man may not separate from his wife nor a wife from her husband except on the ground of fornication; and even if someone separates on this ground, he or she must either remain unmarried [*innuptus*] or be reconciled with the other. For, as the Lord says, what God has joined together man may not separate. Therefore, since a man may not forsake the wife who has been joined to him in legitimate matrimony, he is not permitted for any reason whatsoever [*nulla ratione . . . prorsus*] to marry another woman as long as the former is alive. And if he should do so and fail to strive to make amends by penance [*emendare sub satisfactione*], he must remain separated from the company of the faithful.<sup>20</sup>

Several points should be noted about this text. The first pertains to the form of the letter. Ethelred's enquiry concerned men who had left their wives (and, no doubt, had also remarried, as John's response presupposes). He says nothing about wives who leave their husbands. Thus the first part of John's reply is a general statement of doctrine, for it applies equally to men and to women. Having established the principle involved, John then turns to the case in hand.

Second, the scriptural basis of John's position is manifest. The men in question are acting contrary to the Lord's precept (Matt. 19:9 etc.) and to the principle that man cannot separate what God has joined (Matt. 19:6 etc.). Those who do separate should either remain unmarried (*innuptus*) or be reconciled with each other, in accordance with the teaching of St Paul (1 Cor. 7:11).

Third, those who divorce and remarry are to be excommunicated unless and until they make amends *sub satisfactione*. This is ambiguous. The word *satisfactio* in contexts such as this denotes penance, but its use suggests that the penance in question is sufficient (since *satisfacere* means literally "to do enough"). On the one hand, the ruling may mean that the

<sup>19</sup> *Ibid.*, pp. 100–01.

<sup>20</sup> John VIII, *Epist.* 95 (AD 877), *PL* 126:746B–C.

man could be received back into the Church after fulfilling the appropriate penance even without abandoning his second wife. On the other hand, John may presuppose that the Church required the man to break off his alliance with the second woman. This was the regime known to Augustine.<sup>21</sup> The second interpretation is more likely.

In the early Middle Ages, therefore, the strict interpretation of the Matthean exception became a cornerstone of the Christian doctrine of marriage. This is not to say that the Western Church adhered to this interpretation always and everywhere during this period, but rather that those churchmen who were concerned to remain true to the authentically Christian doctrine of marriage adhered to it with uncompromising conviction. They did so because no other aspect of the Christian doctrine of marriage was as fixed or as central as the doctrine of indissolubility. Once one adopts this doctrine, the exceptive clause in Matthew's Gospel can only mean that while one may divorce on the ground of adultery, one cannot then remarry, however difficult it may be to square this with what Scripture actually says.

The Matthean exception became the test case, as it were, of the doctrine of indissolubility. Even when divorce was valid, there could be no remarriage as long as both spouses survived. But why could neither partner remarry? The answer seemed to be that while divorce certainly dissolved something, it did not dissolve the marriage bond. This implied that marriage contained two kinds of relation: a dissoluble one and an indissoluble one. Indeed, one might posit three relations: the *de facto* sharing of one's life with another person; the *de iure* obligation to do so, and especially to render the conjugal debt on demand; and the marriage bond that can survive the cessation of both the *de facto* and the *de iure* relation. Augustine had seen all this clearly.

#### *Augustine and the marriage bond*

Augustine reasons that remarriage after divorce is adultery because the divorcee is in some sense still married to his or her spouse. Even if the spouses separate or undergo a civil divorce, there remains a *vinculum* or a "something conjugal"

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<sup>21</sup> See Augustine, *De adulterinis coniugiis* II.16(16), *CSEL* 41, p. 401: "qui dimittit . . . adulteram, si alteram duxerit, quamdiu illa prior vivit, perpetuus adulter est nec agit paenitentiam fructuosam a flagitio non recedens. . . ."



(*quiddam coniugale*) that binds them together.<sup>22</sup> Remarriage, like re-baptism, is rather impossible than forbidden. This analysis, with its characteristic shift from deontological matters (rules and prohibitions) to ontological ones (bonds and states) appears to be causal and explanatory: remarriage is invalid *because* the bond remains. Augustine extends this analysis, as we have seen, to the case of divorce on the ground of fornication. Even though divorce in this case, uniquely, is justified and valid, the divorcee is in some way still married.<sup>23</sup> Pope Innocent's perspective was the same. He maintained that a man who remarries while his wife is still alive commits adultery, even though his marriage seems to have been broken up ("quamvis dissociatum videatur esse coniugium").<sup>24</sup> Hincmar of Reims follows Augustine exactly, and like Augustine he compares the marriage bond to the permanent aspect of baptism.<sup>25</sup>

I have suggested that this concept of the marriage bond grew up with a reform that took place in the late fourth and early fifth centuries. Tertullian apart, we find nothing like it in the Fathers before Jerome and Augustine. Rather, authors usually maintained that adultery was an exception to the prohibition of divorce because it violated and therefore destroyed the marriage bond. In this circumstance, the ties of fidelity no longer applied. Even Jerome, in his commentary on Matthew, argued in this way. Indeed, he spoke as if the adultery itself, by vitiating *affectus* and the union in one flesh, had already dissolved the marriage.<sup>26</sup> The theoretical support of Augustine's doctrine was not firmly entrenched even in early medieval canon law. The Council of Friuli in AD 796 or 797, for example, ruled that a man could not remarry after divorcing an adulteress, and the report of the council contains a full account of the bishops' deliberation on this issue, but the bishops made no appeal to the survival of the marriage bond in this circumstance. On the contrary, the decree assumes that the *vinculum* is dissolved in the case of fornication.<sup>27</sup> Augustine had said, "the

<sup>22</sup> *De nuptiis et concupiscentia* I.11, CSEL 42, p. 223. See also *De bono coniugale* 6-7, 17 and 32 (CSEL 41, pp. 196-97, 209 and 226-27).

<sup>23</sup> Thus modern canon law distinguishes *divortium a vinculo* (or *divortium plenum*) from *divortium a mensa et thoro* (or *divortium minus plenum*).

<sup>24</sup> Innocent, *Epist.* 6.6.12, PL 20:500-501.

<sup>25</sup> *Epist.* 136, MGH *Epist.* 8 (*Epist. kar. aevi* 6), p. 100.

<sup>26</sup> *Comment. in Mattheum* III, 19:9, CCL 77, p. 167.

<sup>27</sup> *Conc. Foroiuliense* (AD 796-97) 10, MGH *Conc.* 2, p. 192: "resoluto fornicationis causa iugali vinculo."

bond of the marital compact remains in a wife who has been divorced on the ground of fornication, and the bond is always with her even if she is never reconciled with her husband."<sup>28</sup> While the decree of Friuli expressed the conviction that husband and wife were bound for life, the language was imprecise, and the theoretical basis of indissolubility was still shaky.

What kind of bond is it that survives a valid divorce? Jesus does not say merely that God has forbidden divorce or that it is contrary to God's will. Rather, he explains *why* divorce is prohibited. Genesis tells us that the man leaves his father and mother, is joined to his wife and becomes one flesh with her. This is what God established in the beginning. The writer of Ephesians has this account of conjugal union in mind when he says that the husband should love his wife, and nurture and cherish her, as if she were his own flesh or his own body (Eph. 5:28–29). St Paul adds or makes explicit another dimension: each spouse has power over the body of the other, and each is obliged to satisfy the other's sexual appetite (1 Cor. 7:3–4). The message of the Bible seems to be that it is because a man remains bound to his wife as long as she lives that he cannot be free to marry another woman.

This model has several implications. First, it is because of their union that husband and wife cannot be separated and that their relationship cannot be set aside. Second, it is also because of their union that neither can marry again as long as the other lives, for the union is permanent and in certain respects exclusive. Third, the union is specifically a life-sharing one. In other words, their union is such that they live together, support each other and cooperate in achieving certain ends. Fourth, because they are married, they are *obliged* to live together and to satisfy each other's sexual appetite.

Medieval Latin usage perfectly conveyed this model of marriage. The joining together of husband and wife was often called *copulatio* ("coupling"), for husband and wife go through life as a couple.<sup>29</sup> The union itself was often called a *societas*

<sup>28</sup> Augustine, *De adulterinis coniugiis* II.4(5), CSEL 41, p. 386: "ita manente in se vinculo foederis coniugali uxor dimittitur ob causam fornicationis nec carebit illo vinculo, etiamsi numquam reconcilietur viro. . . ."

<sup>29</sup> The word *copulatio* does not usually mean "sexual intercourse" in patristic and medieval theology and canon law. It sometimes denotes the union (*copulatio carnalis*) attained through sexual intercourse, and it sometimes denotes some non-carnal element in marriage (*copulatio spiritualis*). It usually denotes a condition or relationship rather than an act.

(from *socius*, "companion"). A *societas*, in patristic and in medieval usage, was a partnership, association or confederation. In one of its senses, the word denoted contractual partnerships, such as business associations. A man and his wife were considered to be tied together by a bond (a *vinculum*.) They were called *coniuges* because they had been joined together (the verb is *coniungere*), and because they were bound together by a yoke (*iugum*). The image of the yoke suggested that the spouses had become joined in a common domestic cause. They were like a team of draught-animals cultivating a field together and ploughing the same furrows.

From this perspective, the negative aspects of marriage—what it excludes or prohibits in regard to any third party—can be reduced to positive ones. In other words, the relationship itself is such that certain relations with third parties are excluded. This point may be illustrated by the example of sexual fidelity. The fidelity observed by a certain man with regard to a certain woman does not consist merely in the fact that he does not have sex with any other woman. (If this were so, every celibate monk would be faithful to every woman, which is absurd.) The notion of fidelity presupposes that the man will not have sex with any other woman *because* he has given something to his wife; in other words, because of some positive aspect of their relationship. Remarriage while one's spouse lives is precluded because one has given one's self totally to one's spouse. Divorce and remarriage constitute a form of infidelity.

The Fathers and the medieval Church took the spouses' obligation to live together and to render the conjugal debt extremely seriously. It seemed to Jerome, indeed, that anyone who considered the matter prudently would question whether it was worth getting married at all. When the disciples realized that Jesus was ruling out divorce on every ground other than fornication, they declared that it would be expedient to remain single (Matt. 19:10):

Having a wife is a heavy burden if one cannot dismiss her except on the ground of fornication. For what if she were a drunkard, hot-tempered, badly behaved, lustful, a glutton, inconstant, quarrelsome or abusive? Must one retain a wife of this sort? Like it or not, one must put up with her, for one has subjected one's self to servitude while one was still free.<sup>30</sup> Seeing what a

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<sup>30</sup> Cf. 1 Cor. 7:15: "non enim servituti subiectus est frater," which refers to the Christian whose wife is an infidel and who may separate from her.

heavy yoke [*iugum*] having a wife must be, the disciples spoke out from their hearts, saying: "If such is the case of a man with his wife, it is not expedient to marry."<sup>31</sup>

Jerome heartily agreed with these disciples. Pope Nicholas I insisted that Theutberga should return to her husband, King Lothar of Lotharingia, even when it was clear that her position would be intolerable and her life at risk. Nicholas was not callous—on the contrary, he was much concerned for Theutberga's safety—but the demands of marriage were imperative.<sup>32</sup>

The Western Church allowed that there were two exceptions to the rule requiring husband and wife to remain yoked together for life: namely, unilateral divorce on the ground of fornication, and separation by mutual agreement for the sake of conversion to the religious life. (Separation of the latter kind will be treated in the following chapter.) These two practices and the rationale that attended them caused the model outlined above to be radically revised. From Augustine's perspective, it seemed that husband and wife remained in some way bound to each other even after their life-sharing union and their mutual obligations had ceased. The notion of the marriage bond involved a certain mystique of marriage that went deeper than the data provided in Scripture.

The doctrine of Augustine and the Western Church created a category of divorce that was unknown in either Roman or Judaic law. For while these traditions presupposed that one obtained a divorce in order, other things being equal, to be free to remarry, the Western doctrine recognized the possibility of valid divorce but denied without exception the right to remarry while one's spouse was alive. One source of the doctrine was St Paul's admonition in 1 Corinthians 7:11 that the woman who leaves her husband should remain unmarried. The person who has divorced on the ground of fornication became *innuptus* ("unmarried").

How can a person who has become unmarried still be married? Part of the apparent contradiction here is merely verbal. The word *nuptiae* carried with it specifically sexual

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Jerome may have Christian rather than ordinary freedom in mind.

<sup>31</sup> *Comm. in Mattheum* III, 19:10, CCL 77, p. 167.

<sup>32</sup> See J. Bishop, "Bishops as marital advisors in the ninth century," in *Women of the Medieval World*, ed. J. K. Kirshner and S. F. Wemple (1985), 53–84, esp. pp. 72 ff.

connotations that do not belong to the word "marriage" in English. Hence *innuptus* might mean "living in abstinence." Furthermore, medieval authors regarded the sexual aspect of marriage as a token for the other aspects of the shared life. Indeed, they tended to speak as if sex was the only reason for marrying, and consequently to reduce the life-sharing union to the sexual relationship. Thus a man who had separated from his wife could be described as *innuptus* even though he was still married to her.

Yet problems remain on a deeper level. If marriage is a life-sharing union, how can spouses who are *de iure* separated remain married? If marriage entails the obligation to live together and to render the conjugal debt, how can persons whom the Church has entirely and permanently absolved from these obligations remain married? And if they are no longer joined in a life-sharing union, what union does still bind them and prevent their remarriage?

The opposition between the teaching of the Gospel and the position of secular law regarding divorce and remarriage is very clear. So are the general principles that the man is joined to his wife and becomes one flesh with her, and that man may not separate what God has joined. One must emphasize, however, that the prohibition of remarriage after divorce on the ground of fornication is a special case, for divorce or separation is not permitted at all on other grounds. It is one thing to argue that a man who has divorced his wife because she is sterile is really still married to her, and therefore commits adultery if he marries again, for in this case the divorce is illicit. He is not free because he should have remained with his wife despite her sterility, and because he ought to return to her. It is quite another thing to argue that a man who has divorced an *adulteress* is still married to her, for in this case the divorce is licit and the man is permitted to leave his wife. He may be reconciled with her if he wishes, but he is not obliged to attempt to do so, and in any case it may become evident that reconciliation is out of the question. According to some sources, he must do penance if he does return to her. No decent man could be required to do something that was the source of so much shame. The Western tradition treated the marriage bond as if it was some interior and unknowable condition, and in this way cut off discussion of the possibility of remarriage.

What does it mean to say that husband and wife are joined

by an indissoluble bond? When the idea first arose, it was probably only a way of saying that neither partner was free to remarry as long as the other was alive. Already in the writings of Augustine, however, the bond had become some undefined entity (Augustine's *quiddam coniugale*) that *caused* both the prohibition of remarriage and the prohibition of divorce except on the ground of adultery. The belief that coitus confirmed the bond (as in Hincmar) confirmed Augustine's reification of the bond. From this perspective, the marriage bond was as real and as concrete (though at the same time as mysterious) as the state of virginity.

## CHAPTER TEN

### SEPARATING TO SERVE GOD

In the Western Church, either spouse could divorce the other if the latter was guilty of adultery, but neither could remarry as long as the other lived. They were to remain unmarried (*innuptus*). Moreover, according to the doctrine established by Augustine, husband and wife remained married to one another even after one had validly divorced the other. In that case, they were no longer bound by the obligation to live together and be available for sexual intercourse, but some bond remained between them.

A similar doctrine emerged in regard to those who separated in order to devote themselves to God. Such persons were not usually said to have divorced, and this provides us with a clue as to how churchmen understood separation of this kind. Paradoxically, the Church treated separation on these grounds as a form of union. Nevertheless, the spouses separated permanently, and neither could remarry. As in the case of divorce on the ground of fornication, they no longer shared a common life. Their obligation to live together and to satisfy each other's sexual needs ceased, but they were still considered to remain married and even to remain one body.

Rupert of Deutz, who died in 1129 or 1130, states the doctrine that we must try to explain and to understand very well. Rupert notes Jesus' injunction in Matthew 19:6 that man may not separate what God has joined, but he asks whether *God* may separate what God has joined. He replies that this is entirely permissible. It happens whenever a husband and a wife part company by mutual agreement so that they may devote themselves to prayer (cf. 1 Cor. 7:5). In this way, they become chaste spouses (*casti coniuges*) who prefer love of the spirit (*amor spiritus*) to love of the flesh. This is not really a separation (*separatio*) or a divorce (*divortium*), but rather a change in the nature of their marriage (*honesta coniugii mutatio*). God separates what he has joined; or rather, he joins in the spirit those whom he once joined in the flesh. The first kind of joining is good but the second is better (cf. 1 Cor. 7:38).<sup>1</sup>

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<sup>1</sup> *De sancta Trinitate*, in Gen., II.36, CCM 21, p. 230.

Only the phrase *amor spiritus* betrays that this statement comes from a twelfth-century source. Rupert summarizes better than any modern scholar could ever do the tradition that passed from Jerome and Gregory the Great to the early medieval Church, not least because of his vacillation about the nature of this kind of separation.

What were the sources of this doctrine? What influenced and conditioned its formation? And what did it entail in regard to the conception of the marriage bond? The right conformed with the moral ethos of Christianity. On the one hand, it permitted devout married persons to renounce both sexual congress and the distractions of life in the world; on the other hand, one could not easily exploit it as a way to marry again. It is easy, therefore, to understand what motivated the Church's policy in such matters. In view both of the Church's stern prohibition of remarriage and of the tendency of churchmen to revile and to fear sex, the policy may seem to have been inevitable. Nevertheless, it is not easy to see how churchmen could have squared the practice with certain texts from the Bible or with the Christian doctrine of marriage, both of which emphasized union in one flesh and inseparability. When one looks for the rationale of the practice, one finds only scattered suggestions and hints. Much is left to informed speculation.

The regime itself was clear, for Gregory the Great had established it for the Western Church. His position was not one to which all authorities universally adhered in the Western Church during the early Middle Ages, nor even, perhaps, as late as the eleventh century. But Gregory's regime was always the norm for those who accepted absolutely the doctrine of indissolubility.

As we have seen, Gregory's position regarding separation for the sake of conversion to the monastic life was as follows. First, it is improper for one partner to remain in the world after the other has entered a monastery because by their marriage they have become one body. (Whether Gregory believed that sexual union was necessary for the formation or completion of the union of two in one flesh is not clear.) Secondly, they can only separate for the sake of conversion if both agree to this and both convert. Thirdly, while the law of this world rules that a marriage may be dissolved for the sake of conversion even when one spouse is unwilling, and permits the spouse who remains in the world to remarry,



divine law forbids both of these things.<sup>2</sup>

In his letter to Theoctista, Gregory appeals not only to the principle that husband and wife constitute one body but also to the principle that no-one may separate what God has joined. Jesus and the divine law demand this. Human law, on the contrary, permits one partner to convert while the other remains in the world and even remarries.<sup>3</sup> Gregory does not explain how a divine law that prohibits separation is consonant with the practice of separating to serve God.

It should be emphasized that although those who separated for the sake of their conversion to the monastic life were considered to remain married, they set aside their conjugal rights irrevocably, and not only temporarily or provisionally. Once a spouse had consented to the arrangement, he or she could not recall the other to the marriage bed. This is clear from Gregory's letter to Adrian of Palermo regarding the man who had left his wife to enter a monastery. The man's wife wanted him back. Clearly, even if she had once been in agreement she was not so now, but Gregory asked Adrian to ascertain whether or not the wife had agreed to the conversion. If Adrian found that she had in fact agreed, she was to be compelled to enter a monastery herself.<sup>4</sup> (What kind of compulsion could have been applied is not clear.) If she had not agreed (as seems to have been the case), then her husband had to return to his marriage. Hincmar of Reims has Gregory's letter in mind when he says that neither party can retract once there has been a mutual agreement to convert, and that if one party subsequently changes his or her mind, he or she is obliged to fulfil the agreement nevertheless.<sup>5</sup>

Some may have considered that a spouse who entered a monastery should be deemed to have died, and that his or her marriage was *ipso facto* ended. As we have seen, Justinian permitted either a husband or a wife to dissolve a marriage in order to pass over to the better life of solitude and chastity, and he ruled that if an agreement had been made whereby one party was to benefit when the other died, and the latter

<sup>2</sup> Gregory I, *Registrum epistularum* VI.49, CCL 140, p. 422; *ibid.*, XI.30, CCL 140A, pp. 918–19; *ibid.*, XI.27, CCL 140A, pp. 908–910.

<sup>3</sup> *Registrum epistularum* XI.27, CCL 140A, p. 909.

<sup>4</sup> Gregory I, *Registrum epistularum* VI.49, CCL 140, p. 422.

<sup>5</sup> Hincmar, *Epist.* 136 (*De nuptiis Stephani*), MGH *Epist.* 8, p. 100, lines 33–34: "Si autem ex communi consensu se mutare promiserint et quilibet eorum se inde retraxerint, ad conversionem suum sequi parem praecipitur."

had dissolved the marriage in order to answer the vocation to chastity, then the agreement was to come into effect. For since the dissenting party had chosen to leave one way of life to follow another, this party had died as far as the marriage was concerned.<sup>6</sup> Theologians in the thirteenth century applied a similar rationale to unconsummated marriage, arguing that it could be dissolved by spiritual death (that is, entry into a monastery) because it was a spiritual union. Only carnal death could dissolve a consummated marriage.<sup>7</sup>

I have found no evidence, however, that this line of argument was used in the Western Church during the patristic and early medieval periods, and the argument from spiritual death presupposes that the marriage in question is ended. What we are concerned with here, on the contrary, is a regime according to which a marriage does not survive death but does survive separation for conversion to the religious life. Moreover, conversion is permitted only if there is mutual agreement and if both partners convert. Justinian's laws may have permitted unilateral divorce, although this is not entirely clear. The high medieval law certainly permitted a spouse to dissolve an unconsummated marriage even when her partner was unwilling.

Whereas divorce on the ground of fornication was based on Scripture (that is, on Matthew 5:32 and 19:9), there was no explicit support in the Bible for the practice of separating to serve God. There were, however, several sources in the Bible to which bishops and theologians appealed.

First, there was 1 Corinthians 7, in which St Paul counseled that those with wives were to behave as if they have none (v. 29). He also permitted husband and wife to abstain from normal conjugal relations by agreement (*ex consensu*) in order to devote themselves to prayer (v. 5). Paul emphasized that they might do so for only a short time, and that they ought to return again to each other lest Satan should use their incontinence as a means to tempt them. Perhaps some thought that the coenobitic life was sufficient to ward off the attacks of

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<sup>6</sup> *Nov.* 22.5.

<sup>7</sup> See William of Auxerre, *Summa aurea* IV.17.2.2, solutio, and *ibid.* ad 3<sup>m</sup> (*Spicilgium Bonaventurianum* 19 [Grottaferrata, 1985], p. 388); Albert, IV *Sent.* 28.6, ad 6<sup>m</sup> (ed. Borgnet, vol. 30, pp. 195–96); *ibid.*, 30.12, ad 1<sup>m</sup> (p. 225); *ibid.*, 27..3, ad 1<sup>m</sup> (p. 132); Thomas Aquinas, IV *Sent.* 27.1.3, solutio 2 (Vivès edition, vol. 11, pp. 85–86). Regarding Albert's phrase "convolat ad frugem vitae melioris" (27.3, ad 1<sup>m</sup>), cf. the *Authenticum*'s "ad meliorem migrans viam" and "aliud pro alio vitae eligens iter" (*Nov.* 22.5).

Satan, so that a religious could overcome the problems that made abstinence within marriage inexpedient. Jesus, however, taught that in marriage a man cleaved to his wife and that the two became one flesh. It is hard to see how husband and wife were living in accordance with this principle when they became "dead to the world" and lived apart in their respective monasteries.

Another source consists in certain of Jesus' hard sayings. One thinks especially of Jesus' reply to Peter in Luke 18:28-30: "Truly, I say to you, there is no man who has left house or wife or brothers or parents or children, for the sake of the kingdom of God, who will not receive manifold more in this time, and in the age to come eternal life."<sup>8</sup> Peter was married, and he must have left his wife to follow Jesus. The *Excerptiones Egberti*, an episcopal handbook of canon law written around AD 1000, says that marriage cannot be separated except by mutual consent and for the love of Christ, since Christ himself said that he who leaves his wife will receive an hundred-fold and will possess eternal life.<sup>9</sup> The reference is to Luke 18:29-30.

Third, there is Jesus' teaching that no man should separate what God has joined. An argument *e contrario* deduced that God might separate what he had joined, and that for this reason a couple might separate to devote themselves to the worship of God. Jerome, commenting on Matthew 19:6, argues that no-one can separate husband and wife except God. For while "man separates when he dismisses his first wife because of his desire for a second," "God separates us, who also joined us together, when by agreement and in order to serve God we behave towards our wives as though we had none, because the time is limited."<sup>10</sup> The last part of this statement echoes 1 Corinthians 7:29.

Versions of Jerome's argument appear in Hincmar's treatise

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<sup>8</sup> RSV. See C. N. L. Brooke, *The Medieval Idea of Marriage* (1989), pp. 44-45.

<sup>9</sup> Canon 105, ed. R. A. Aronstam, "The Latin Tradition in Late Anglo-Saxon England" (1981), p. 93: "Legitimum enim coniugium nullus separare presumat, nisi ex amborum consensu et propter amorem Christi, qui ait: *Qui relinquerit uxorem et rel. centuplum accipiet et vitam eternam possidebit.*" Canon 105 (p. 92) notes but rejects the opinion of someone (*quidam*) that if one spouse takes up the monastic life with the consent of the other, the latter can remarry. On the contrary, a man can convert only if his wife agrees to this and vows to remain chaste. If she remarries, she becomes an adulteress.

<sup>10</sup> CCL 77, p. 166.

on the divorce of King Lothar of Lotharingia and in a letter from Pope Nicholas I to Lothar himself. Nicholas affirms that "although it is written, 'what God has joined man should not separate,' it is God who separates, and not man, when marriages are dissolved in consideration of divine love with the agreement of both spouses."<sup>11</sup> Hincmar repeats Jerome's gloss on Matthew 19:6 and adds that God separates the spouses not in respect of the marital bond he has made between man and wife but in respect of the carnal relationship that exists between them. If they are not strong enough to abstain permanently, they should do so for only a little while, so that they may devote themselves to prayer. They should then come together again, lest Satan tempt them through their lack of self-control (cf. 1 Cor. 7:9).<sup>12</sup>

The doctrine involves an apparent paradox. A husband and wife can separate, under certain conditions, to devote their lives to God; but having done so, they not only remain married but remain true to the Christian ideal of marriage as a bond of union and fidelity. The paradox might be resolved if one could distinguish between different aspects of marriage, such that one aspect may be dissolved while another remains. I have found two ways of making this distinction in the sources.

One way is to distinguish between the carnal and the spiritual aspects of marriage. Hincmar of Reims, in the passage cited above, tries to maintain both that God can separate the marriage bond and that the marriage bond, having been made by God, is never separated. He maintains that only God can separate what God has joined, but that when God does so he does not separate the spiritual bond he created when he joined the spouses. This explanation (such as it is) requires Hincmar to posit some spiritual, non-carnal bond or relationship in marriage that is more fundamental than the carnal and life-sharing relationship. On the one hand, there is a carnal relationship between the spouses (what Hincmar calls the *carnalis commercio et uxorea usus commistio*); on the other hand, there is the essential marital union that God created when he joined them (*maritalis et uxorea secundum Deum inita coniunctio*). Only the former is dissolved when spouses separate to serve God. Hincmar does not tell us in what the essential relationship

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<sup>11</sup> Nicholas, *Epist.* 46 (AD 867), *MGH Epist.* 6 (*Epist. karolini aevi* 4), p. 324.

<sup>12</sup> Hincmar, *De divortio Lotharii et Tetbergae*, PL 125:642C.

consists. This attempt to separate the union made by God from the carnal union that the couple forge between themselves is awkward and paradoxical. Moreover, Jesus himself gives no indication that the two aspects of marriage can be separated.

Another way pertains to marriage inasmuch as it may be regarded as a consensual and contractual relationship. According to the orthodox view, separation for the sake of conversion to the religious life is illicit unless it is by mutual agreement. It should be noted that this mutuality has two aspects, although they are usually conflated. First, each partner requires the consent of the other, for only in this way can either be released from his or her conjugal obligations. Thus Gregory objects that civil law permits a person to convert without his partner's consent. Secondly, the partners must both convert, or at least both make vows of chastity. Thus Gregory argues that one spouse cannot convert and leave the other in the world because they have been joined by God and have become one body. We shall return to the second, fuller or more positive aspect of mutuality in due course. For the moment, let us concentrate on the contractual aspect.

St Paul posits a "conjugal debt" that each partner owes to the other. The notion has two implications. First, it suggests that when a man and a woman get married, each person voluntarily becomes obligated to the other. Thus marriage itself begins to look like a kind of contract: that is, a binding agreement. Secondly, the existence of the conjugal debt does not of itself require that each partner should *have* sex with the other, only that each should provide sex *when requested* by the other. Each is at liberty not to demand sex of the other. Their relationship consists in obligations that each owes to the other by virtue of a prior agreement or contract between them. From this point of view, marriage is a relationship from which either partner might be reasonably expected to have the right to release the other.

This conclusion may seem rather alarming, but it would not have been so from the perspective of Roman law, in which divorce by mutual agreement was usually acceptable even under the Christian emperors.<sup>13</sup> Not until Justinian's novel of AD 542 was divorce by mutual consent abolished (*Nov.* 117.10), and Justin II soon restored it (*Nov.* 140). Justinian's novel

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<sup>13</sup> See *CJ* 5.17.9; and *Lex Romana Burgundionum* 21.1–3, *MGH Legum Nat. Germ.* 2.1, p. 143.

explicitly treats divorce in order to follow the religious life as the only permissible case of divorce by mutual consent. His aim was to exclude the latter in general while retaining it exceptionally in this one circumstance. It is impossible to ascertain how prevalent divorce by mutual consent was in early medieval Christendom, but the occurrence of a standard charter for this purpose in formularies of the seventh and eighth centuries shows that it was by no means unknown. This was undoubtedly due to the influence of Roman law, although the charter justifies the separation on theological as well as pastoral grounds, affirming that there is such discord between the partners that godly charity (*caritas secundum Deum*) no longer obtains and that their continued life together has become intolerable.<sup>14</sup> By the agreement recorded in the charter, each partner is at liberty to marry again or to serve God in a monastery.<sup>15</sup> The contractual model of marriage suggested by St Paul (in 1 Cor. 7:3–4) was to this extent congruent with Roman law and custom. Moreover, just as St Paul allows spouses to abstain *ex consensu* (let us overlook the fact that he also says *ad tempus*), so also Roman law permitted spouses to divorce *ex consensu*.

The similarity between separation for the sake of the religious life on the one hand and divorce by mutual consent on the other is apparent in some English eighth-century penitentials. One canon in the penitential ascribed to Theodore of Canterbury says that “a legitimate marriage may not be broken without the agreement of both parties.” The next canon adds that “either spouse may grant the other leave to enter a monastery in the service of God and may then remarry if this is the person’s first marriage . . . but if it is the person’s second marriage, remarriage is not permitted as long as the husband or wife is alive.” And shortly after this, a canon says that neither husband nor wife is permitted “to serve God” if the other partner is unwilling. On the contrary, “they may be separated only

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<sup>14</sup> See the following in *MGH Leges* 5, *Formulae*: Marc. II.30 (p. 94); Tur. 19 (pp. 145–46); Merk. 18 (p. 248); Sen. 47 (p. 206).

<sup>15</sup> Marc. II.30, p. 94: “Dum et inter illo et coniuge sua illa non caritas secundum Deum, sed discordia regnat, et ob hoc pariter conversare minime possunt, placuit utrisque voluntas, ut se a consortio coniugali separare deberent; quod ita et fecerunt. Propterea has epistolas inter se duas uno tenore conscribtas fieri et adfirmare decreverunt, ut unusquisque ex ipsis, sive ad servitium Dei in monasterio aut copolam matrimonii sociare voluerit, licentiam habeat. . . .”

with the agreement of both of them."<sup>16</sup>

This regime is very different from Gregory's. The penitential permits the conversion of one partner while the other remains in the world, and it permits the latter to remarry. Similarly, the Council of Compiègne, held under Pepin's auspices in the mid eighth century, decreed that if a woman took the veil without her husband's consent, he could take her back, if he so wished, as his wife (can. 5), but the man could give her leave to take the veil, whether in a monastery or otherwise, and was then free to remarry. A woman had the same right if her husband wished to convert (can. 16).<sup>17</sup> In these sources, as in Justinian's novel of AD 542 (*Nov.* 117.10), separation for the sake of conversion to the religious life is regarded as divorce by mutual consent. It seems that the rationale derives from this right, with little regard for 1 Corinthians 7:5 or Matthew 19:9.

Now, the possibility of divorce by mutual consent, as we have seen, presupposes that marriage is something like a contract. Since the parties have become bound to each other by virtue of their mutual agreement, they can release one another. From this point of view, the marriage exists by virtue of something each partner owes to the other. To what extent could this model be applied to Christian marriage? The orthodox answer may have been that, thanks to Paul, it applied well enough to the sexual side of marriage. Sexual procreation was not considered (as it was in the ideology of the Old Testament) as an obligation toward God. But from the orthodox point of view, even though spouses might absolve one another permanently from the conjugal debt and from their other life-sharing obligations, the marriage did not end there. The couple remained one body (as Gregory argued) and were still bound together *by God* (as Hincmar argued) even when they were no longer required to share a common home or a common bed. In this respect, marriage was more like monastic vows than a contract. Thus marriage remained impervious to dissolution by mutual agreement precisely inasmuch as it was something other than or more than a mutual contract. And to that extent

<sup>16</sup> *Penitential* II.12, canons 7, 8 and 13, ed. Finsterwalder, *Die Canones Theodori Cantuariensis*, pp. 327–28 (Haddan and Stubbs, vol. 3, pp. 199–200).

<sup>17</sup> *Decretum Compendiense* (AD 757), *MGH Capit.* 1, p. 38. Cf. *Decretum Vermeriense* (AD 758–768?), can. 21, *MGH Capit.* I, p. 41: "Qui uxorem suam dimiserit velare, aliam non accipiat." This may pertain to men who make their wives enter monasteries so that they can marry again.

their relationship was not something that each owed to the other, for it is in the nature of a debt that the debtor can be released by the one to whom he or she owes the debt.

We have noted that there were two aspects to the mutuality required by the Western regime, although they were not usually distinguished. Not only does each partner require the consent of the other, but the partners must both convert. In other words, there is *consensus* or mutual agreement in the strong sense that they are of one mind and convert together. Another possible rationale for the practice in question here focuses on the partners' shared will and shared devotion to God. From this point of view, it might seem that a husband and wife remain at one when they convert together, and even deepen their union by their manifestation of fidelity and generosity. I have not found this idea in a patristic or early medieval source, but it was how the matter appeared to Hildegard of Bingen (1098–1178), who maintained that the husband and his wife who separated to become religious were united by their common will and their common love of Christ.<sup>18</sup> A similar idea may well have been present from a much earlier period: namely, that in converting to a life of service of God, even though they sacrifice their common life, husband and wife share the same goal and the same will. They are joined not in carnal union, with all its disadvantages, but in spiritual liberation.

Let us sum up. How may one square with the doctrine of indissolubility the right of couples to separate permanently so that they could enter monasteries? And in what sense are spouses who have separated in this way still married? The doctrine presupposes that while the spouses cease to be married in one sense they are still married in another sense, and I have suggested that two or three rationales for this supposition were available. First, one may distinguish between two relationships or bonds in marriage, a carnal one and a spiritual one (whatever the latter may be). The former is dissoluble (at least when God dissolves it and when the spouses mutually agree to this), while the latter is indissoluble (as long as both spouses are alive). Second, one may distinguish the contractual bond of marriage (which is naturally dissoluble by mutual agreement) from some other, non-contractual bond. Third, one may maintain that spouses who separate in this way remain united, and

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<sup>18</sup> Hildegard, *Scivias* I.2.11, *CCM* 43, p. 20.



indeed become united in a higher way: namely, by their common will, by their charity, and by their shared devotion to Christ.

The doctrine flowed from the acceptance *both* of the ascetic renunciation of marriage *and* of the doctrine of indissolubility. It arose in contradistinction to Roman law, which permitted renunciation without confirming indissolubility. It arose despite the well established doctrine that death dissolved marriage. (The remarriage of a widow was perfectly valid.) Thus the doctrine was not merely an extension of the old Roman idealization of the *univira*.

Those who maintained both the possibility of renunciation and the doctrine of indissolubility were required to posit some bond that is other, and deeper or higher, than the mundane forms of relationship that were usually treated, in the Bible as in Roman law and pagan anthropology, as the very stuff of which marriage is made: namely, sexual intercourse and the shared life. In the Christian perspective, there is something inevitably ambivalent and Janus-like about marriage. The spouses make their own marriage, by mutual agreement, and yet it is God who joins them. Thus marriage is both man-made and God-made.<sup>19</sup> It is both holy and unholy, and both carnal and spiritual. What can be more spiritual than a union joined by God? and what can be more carnal than the union of two in one flesh? The practice of separating to serve God was not the only reason for distinguishing between the carnal and the spiritual aspects of marriage, but it was one of them, and some explained it in these terms. It should be added that these distinctions, in their application to marriage, carry with them tension, ambiguity and paradox. It is tempting to read them in the light of the idea of the Incarnation, but there was no Chalcedonian solution to the dualities of marriage.

Separation for the sake of conversion, like divorce on the ground of fornication, favoured the tendency to treat the marriage bond as if it were some mysterious entity above and beyond the carnal and life-sharing union and the mutual obligations of the couple. Even if the formation or completion of the bond requires sexual consummation (a thesis that Augustine resisted), the union of "two in one flesh" survives a separation of the spouses that is both valid and permanent. Christian marriage, from this point of view, cannot after all

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<sup>19</sup> Hence the modern notion of marriage as a "contract-sacrament."

be in essence what many high medieval canonists and theologians affirmed that it was: a union involving the sharing of the spouses' whole life.<sup>20</sup> Despite the notion of spiritual union, the Western conception of the marriage bond tended to be negative. It was something manifest not in any positive condition or obligation but rather in what one could not do: namely, marry another person. Marriage, from this point of view, was above all the loss of one kind of liberty, while entry into the religious life was the attainment of another kind of liberty.

It is important for our purposes to distinguish between two kinds of marital renunciation. One kind consists in the practice of separating to follow some form of the monastic life, whether it be coenobitic or eremitic. The other kind consists in the practice of chaste marriage, in which the spouses continue to live together as brother and sister. Whereas in the latter practice the spouses renounce only sexual relations, in the former practice they renounce their shared life as well. St Paul warns against abstaining from sexual relations within the married life 1 Corinthians 7:5 (although this did not prevent some twelfth century theologians, such as Hugh of St Victor, from favouring and advocating it). What is chiefly in question here is renunciation of the world to enter the monastic life. It is not difficult to see how the conversion itself is a shared act, but it is difficult to see how the life that follows it is a shared act.<sup>21</sup> How can spouses who live apart, serving God in separate monasteries, continue to be united in any real sense? The notion of marital union should be an open one, but to count separation as form of union seems to be against the rules even of a Wittgensteinian language game. By these standards, one might deem anything to be anything.

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<sup>20</sup> The definition came from *Dig.* 23.2.1 ("nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio") and *Inst.* 1.9.1 ("nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens").

<sup>21</sup> Abelard and Heloise remained in communication with each other, but this was an exception and not the rule.

**PART THREE**

**AUGUSTINE'S THEOLOGY OF MARRIAGE**



## CHAPTER ELEVEN

### AUGUSTINE ON MARRIAGE AS SPIRITUAL UNION

Two considerations led Augustine to posit a spiritual, non-carnal relationship as the essence of marriage. First, he was for a while inclined to suppose that the marriage of Adam and Eve before the Fall was a purely spiritual relationship, although he came to reject this opinion during the first decade of the fifth century. Second, in treatises that he wrote after his change of mind regarding Adam and Eve, he insisted that marriage was no less marriage when the spouses lived together chastely, without sexual congress. We shall examine each of these aspects in turn.

#### *Marriage before the Fall*

Augustine's conception of the state of original rectitude developed in tandem with his conception of the fallen condition. This twofold development was allied to a preoccupation with the literal sense of the narrative of Adam and Eve. By the time he wrote Book IX of the *De Genesi ad litteram*, at some time during the first decade of the fifth century, Augustine had come around to the view that the nature of our first parents before the Fall was the same as our nature minus its defects. Adam and Eve were mortal even before sin, although by the grace of God and by virtue of the fruit of the Tree of Life they would not have tasted death. And they were to reproduce sexually, but calmly, without lust and without the disordination and lack of rational control that characterizes sexual activity in this fallen world, and that makes everyone ashamed of the sexual act. Book XIV of the *City of God* contains Augustine's most thorough account of pre- and post-lapsarian sexuality.

The question at stake here was not whether Adam and Eve had had sex before the Fall. It seemed sufficiently clear that their first act of intercourse took place after the Fall, as recorded in Genesis 4:1. Rather, the question was whether they *would* have done so or whether God *intended* them to do so. In other words: if sin had never entered into the world, would there have been sexual procreation?

At first, Augustine tended to suppose that Adam and Eve would not have procreated sexually in Eden, although he never insisted on this. He was in good company, for the notion of coitus in Eden was alien to the Greek Fathers. His opinion owed something to the Alexandrian tradition, but even John Chrysostom, who was in the Antiochene tradition, considered that if there had been no sin, God would have found some other way to fill the earth with humankind.<sup>1</sup> Nevertheless, Augustine's later, literal interpretation of the command to increase and multiply was no novelty. Nor were men like Jovinian and Julian of Eclanum, who were condemned as unorthodox in their own lifetimes, the only ones to have affirmed that sexual procreation was part of the original, God-given order of things. Ambrosiaster had argued the same in a conservative but perfectly orthodox treatise that he composed probably in the 380s.<sup>2</sup> This is the treatise *De peccato Adae et Evae*, from the *Quaestiones veteris et novi testamenti*.<sup>3</sup>

In this treatise, Ambrosiaster argues that man<sup>4</sup> is integral to the world in which he finds himself. God made all things for the sake of man, and man's way of procreating is the same as that of all animals. Therefore this way is good and something that God intended from the first. Man's animal method of procreating is not a consequence of the Fall. God gave man the same blessing and the same command to procreate that had been given to the irrational animals in Genesis 1:22:

For by this benediction those things were blessed that were created for the sake of man, and by that benediction also man was blessed, so that in a similar way, from male and female, the progeny of mankind should increase and multiply over the earth; and so that, just as seed is improved through cultivation, so also mankind should take care and strive to achieve this end: that having attained knowledge of its creator it should control [*frenaret*] its life to make itself worthy of him, in order that all things should advance for the praise and glory of the creator.<sup>5</sup>

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<sup>1</sup> *De virginitate* 17, PG 48:546.

<sup>2</sup> See D. H. Hunter, "On the sin of Adam and Eve: a little-known defense of marriage and childbearing by Ambrosiaster," *Harvard Theological Review* 82 (1989), 283–99.

<sup>3</sup> CSEL 50, pp. 399–416.

<sup>4</sup> Exclusive language is appropriate where Ambrosiaster is concerned.

<sup>5</sup> *Quaest.* 127.2, CSEL 50, pp. 399–400.

To curse what God has blessed is heresy,<sup>6</sup> and the goodness of marriage is a straightforward and simple matter.<sup>7</sup> The evidence of nature, Ambrosiaster argues, corroborates that of Genesis, for the various genera would not multiply and improve without God's benediction and continued favour. Nor could they have increased by any other way than that "decreed to the seed by God's will and benediction." The liturgical benediction of marriage re-enacts or commemorates what God did in the beginning and declares the continuing goodness of marriage.<sup>8</sup> Childbearing became painful after the Fall, but only the difficulty was new, and not the means of procreation itself.<sup>9</sup> Unlike Augustine, Ambrosiaster does not seem to consider that the Fall has resulted in any fundamental disorder of the will or that sexual intercourse is deeply tainted with evil.<sup>10</sup>

Augustine's thought on this subject underwent a profound change at the beginning of the fifth century. The change was complex, and as several scholars have shown, it may be followed in his manner of interpreting the command of Genesis 1:28, "increase and multiply."<sup>11</sup> It pertains to his hermeneutics as well as to speculation about the nature of the original, pre-lapsarian condition. A brief account of this story must suffice here.

One of the young Augustine's reasons for rejecting Christianity was the apparent crudeness of the Bible.<sup>12</sup> Having failed to find there the wisdom he sought, he turned to the Manichees, who were critical of the Old Testament. Augustine's resistance to the Bible vanished when he heard Ambrose expounding Scripture. He could now perceive the spirit that lay beneath the letter, and he could therefore understand how the Old Testament, far from being cruder than Manichean doctrine

<sup>6</sup> *Ibid.*, 6, pp. 400–01.

<sup>7</sup> *Ibid.*, 14: "Est enim res aperta et simplex."

<sup>8</sup> *Ibid.*, 3, p. 400.

<sup>9</sup> *Ibid.*, 30, p. 412.

<sup>10</sup> See D. H. Hunter, "On the sin of Adam and Eve," pp. 291–93.

<sup>11</sup> See *Oeuvres de saint Augustin* 49 ([= *De Genesi ad litteram* VIII–XII], Bibliothèque Augustinienne, 1972), ed. P. Agaësee and A. Solignac, note 42, pp. 516–530; Emile Schmitt, *Le mariage chrétien* (1983), pp. 86 ff.; Yves-Marie Duval, in Augustine, *Lettres* 1\*–7\*, = *Oeuvres de saint Augustin* 46B (Bibliothèque Augustinienne, 1987), pp. 448–52; and E. A. Clark, "Heresy, asceticism, Adam and Eve: interpretations of Genesis 1–3 in the later Latin Fathers," in E. A. Clark, *Ascetic Piety and Women's Faith* (1986), 353–85. For a summary account, see J. Cohen, "Be Fertile and Increase, Fill the Earth and Master It" (1989), pp. 245–59.

<sup>12</sup> *Conf.* III.5(9), CCL 27, pp. 30–31.

and mythology, was immeasurably truer and wiser. Allegorical method revealed the wisdom of the Old Testament and overcame the criticisms of the Manichees<sup>13</sup>. What he had heard Ambrose practicing was allegorical exegesis in the Alexandrian manner. Indeed, Ambrose was much indebted to Philo himself. It was by using the techniques of allegorical exegesis that Augustine defended the Biblical account of creation in his *De Genesi contra Manichaeos*.

Also influential upon Augustine after he turned to Christianity was a kind of speculation about the origin of humankind that Origen had introduced and others in what may be broadly called the Alexandrian tradition had developed and re-interpreted. Characteristic of such speculation was a tendency to assimilate the original condition to the final one. Theologians applied Jesus' reply to the Saducees in Luke 20:34 ff., according to which the citizens of the Kingdom of Heaven "neither marry nor are given in marriage . . . because they are equal to angels," to the pre-lapsarian condition.<sup>14</sup> Not only does one need allegorical method to extract this kind of meaning out of the first three chapters of Genesis, but the two tendencies, respectively exegetical and anthropological, are closely related. Both involve a characteristically Alexandrian and Platonizing tendency to devalue the material world.

Before he arrived at the point of affirming the literal truth of the Bible's account of creation, Augustine had allegorized the command that humankind should increase and multiply. A late example of this approach (perhaps around AD 401?) occurs in Book XIII of the *Confessions*. While not denying that one might literally interpret the original blessing, Augustine says that he prefers to interpret it figuratively or allegorically. He concludes that the text refers to a fertility of the intellect by virtue of which one can interpret an obscure passage of Scripture in several ways!<sup>15</sup> Here Augustine avoids raising questions about the nature of the original condition.

The allegorical method could be used not only to provide a spiritual reading of the record of creation but also to derive a

<sup>13</sup> *Ibid.*, V.14(24) and VI.4(6), pp. 71 and 77.

<sup>14</sup> Cf. Gregory of Nyssa, *De hominis opificio* 17, PG 44:188–192. On Gregory's thesis, see É. Jeuneau, "Le division des sexes chez Grégoire de Nysse et chez Jean Scot Érigène," in *Eriugena. Studien zu seinen Quellen*, ed. W. Beierwaltes (1980), pp. 36–46.

<sup>15</sup> *Conf.* XIII.24(35–37), CCL 27, pp. 262–64.



spiritual account of the original condition itself. In other words, just as one may understand the command to procreate either literally or allegorically, so may the original fecundity itself be understood either as something carnal or as something spiritual. In the *De Genesi contra Manichaeos*, written in the late 380s, Augustine seems to suppose that our first ancestors were at least in a moral sense less corporeal than we are. God endowed their bodies with qualities that were analogous to the transparency and simplicity of the heavenly bodies, and Genesis refers metaphorically to the change in their physical condition when it speaks of God clothing them with garments of hide (Gen. 3:21). Augustine speculates that the change pertained to a loss of harmony between body and soul, which was such that human beings became able to practice deception, for their bodies were no longer transparent to their thoughts and feelings. Although he does not commit himself to any theory of pre-carnal bodies, his treatment emphasizes the physical nature of the change. Before the Fall, it seems, Adam and Eve were immortal and incorruptible. While not categorically denying that God intended them to procreate sexually, Augustine's treatment makes this seem highly unlikely. The fruitfulness to which God called Adam and Eve need not be understood literally.<sup>16</sup>

In Book I of the *De Genesi contra Manichaeos*, Augustine asks what kind of union (*coniunctio*) existed between man and woman before the Fall, and what kind of blessing God gave them when he said, "increase and multiply, and generate, and fill the earth." Should the blessing be understood carnally (*carnaliter*) or spiritually (*spiritualiter*)? His answer is evasive: "We are also permitted [*licet . . . nobis . . . etiam*] to interpret it spiritually, so that it may be considered to have been converted into carnal fecundity after sin."<sup>17</sup>

Clearly, Augustine does not rule out the possibility of interpreting the text literally, but what he offers can only be an alternative, and not an addition, to a literal sense. Whereas in his mature opinion, as expressed in the *De Genesi ad litteram*, such texts must be understood literally but may also be understood spiritually, what he is suggesting here is that Adam and Eve were not literally intended to procreate, or at any rate to procreate sexually. The method of exegesis applied in the earlier

<sup>16</sup> *De Genesi contra Manichaeos* I.19(30) and II.21(32), *PL* 34:187 and 213.

<sup>17</sup> *De Gen. c. Mani.* I.19(30), *PL* 34:187.

commentary is similar to Origen's. He assumes that in spiritual or allegorical interpretation, the spiritual senses belong to the text itself rather than to historical realities literally denoted by the text. He makes no clear and consistent distinction between typology and metaphor. The literal sense of the creation story belongs only to the text and is nothing more than a shadow. According to Origen, some texts can only be understood spiritually because they make no sense literally. Following Philo, he regarded the Biblical account of Adam and Eve as a case in point. We cannot seriously suppose, Origen argued, that God, like a farmer, planted a garden, that God walked in the garden, or that there was a physical, tangible Tree of Life in it.<sup>18</sup> Just as Origen thought that literalism in such contexts led to error and made the Gospel incredible to thinking persons, so Augustine saves Genesis from the criticisms of the Manichees by means of spiritual interpretation. Although he does not deny that the record of Adam and Eve might be literally true—since all he needs for his defense against the Manichees is the premise that the story *may* be interpreted spiritually—the reader is left in no doubt as to Augustine's preference for a non-literal reading.

Assuming that Genesis 1:28 should be interpreted spiritually, how are we to understand the original union of Adam and Eve and the fecundity to which God called them? Augustine suggests that there existed between Adam and Eve a "chaste union" (*casta coniunctio*) such that one ruled and the other obeyed.<sup>19</sup> Their spiritual progeny of "intelligible and immortal joys" would have filled the earth. He finds evidence for this thesis in Jesus' answer to the Sadducees in Luke 20:34 ff. Jesus says that the "sons of this age" generate and are generated, while those who will be deemed worthy to attain to the resurrection from the dead will neither generate nor be generated. In saying this, Augustine argues, Jesus implies that the carnal generation of this life is of no value in comparison with the life to come that has been promised to us. Before sin entered into the world, Adam and Eve were not yet "sons of this age," and God did not intend them to generate offspring by means of coitus.

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<sup>18</sup> Origen, *De principiis* IV.2.9 and IV.3.1, ed Crouzel and Simonetti, vol. 3, *SC* 268 (1980), pp. 334–346.

<sup>19</sup> *De Gen. c. Mani.* I.19(30), *PL* 34:187: "Erat enim prius casta conjunctio masculi et feminae; huius ad regendum, illius ab [*sic*; ad?] obtemperandum accomodata."

There can be no doubt that Augustine found a spiritual-historical sense in the text, which seems to him to describe the original condition of Adam and Eve when they were quasi-angelic beings, but even here, Augustine's mind moves quickly to non-historical senses. The passage summarized above (at least as it stands in the *Patrologia Latina*) incorporates a disconcerting gloss upon itself: their progeny would have filled the earth—that is, vivified the body—and they would have subdued it—that is, kept the body in subjection so that it was not a source of adversity and harm.

This allegorical-anthropological level of interpretation, which also is characteristically Alexandrian, appears again in Augustine's gloss on Genesis 2:18 in Book II of the commentary. God said, "It is not good that the man should be alone; I will make an help [*adiutorium*] fit for him." What help did God make Eve to provide? Augustine answers that God made Eve so that Adam should be able, by means of their spiritual union (*copulatio spiritualis*), to give birth to spiritual progeny: namely, "the good works of divine praise." Adam would rule and Eve would obey, for he would be ruled by Wisdom and she by Adam. As St Paul teaches, Christ is the head of the man and the man is the head of the woman (1 Cor. 11:3). At this point in his commentary, Augustine's interpretation becomes anthropological. He distinguishes between two aspects of the soul: a higher aspect that he calls the *ratio virilis* and a lower aspect that he describes as the animal part and as appetite. Only the lower aspect is directly involved with the body. Not only should the body be subject to the soul, but so also should the lower part of the soul be subject to the rational, virile part. Virile reason needs the help of the lower soul to rule over the body. God formed Eve as an *exemplum* (i.e., a type or illustration) of the proper order between the lower and higher parts of the soul. For what is plainly and evidently the case between husband and wife is also true of the inner man. (From the outward *exemplum*, we can learn something about the soul.) If a wife dominates her husband, their home is disordered and wretched ("perversa et misera domus est").<sup>20</sup>

A more refined version of the anthropological interpretation will later appear in Book XII of the *De Trinitate*, where Augustine supposes that Adam and Eve represent the higher and lower aspects of reason respectively. The latter aspect is

<sup>20</sup> *De Gen. c. Mani.* II.11(15), *PL* 34:204–05.

simply reason inasmuch as one deploys it for temporal and corporeal ends. By this means, Augustine also spiritually interprets 1 Corinthians 11:7, and thereby obviates a thorny problem, for the latter text seems to imply that God made only man, and not woman, in his own image, a thesis that Augustine cannot accept as literally true.<sup>21</sup>

In the *De Genesi contra Manichaeos*, therefore, it is possible to discern at least three levels of meaning in Augustine's interpretation of Adam and Eve's relationship. First, there is a spiritual-historical sense, pertaining to the original condition of Adam and Eve as quasi-angelic beings. Second, there is an allegorical-anthropological sense, pertaining to the proper relationship between the higher and lower parts of the soul. Third, there is a moral or tropological sense, pertaining to the proper relationship between husband and wife. What is lacking is a literal-historical sense. Although Augustine fails to commit himself to any definite theory regarding the nature or the condition of humankind before the Fall, he instinctively resists the notion there might have been sexual procreation before or in the absence of sin.

In the *De bono coniugali* (ca. AD 401), Augustine expresses uncertainty as to whether one should understand the command to increase and multiply figuratively or literally and as to whether Adam and Eve were to have reproduced sexually or asexually. He cites the formation of Eve from Adam, the generation of Jesus from Mary and parthenogenesis in bees as examples of asexual reproduction. Augustine suggests as one possibility what will become his mature opinion: namely, that Adam and Eve were ordinary fleshly beings, like us, who would have procreated sexually; and that Adam and Eve were not like the angels in the beginning, but rather were intended to become like the angels in the end. Accepting this thesis entails abandoning the Alexandrian presupposition that the end is a return to the beginning.

In Book III of the *De Genesi ad litteram*, Augustine still entertains the possibility that Adam and Eve would have reproduced asexually, but by the time he writes Book IX, he has settled on the alternative solution. Here he asks again what kind of help God intended Eve to give Adam (Gen. 2:18), and the

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<sup>21</sup> CCL 50, pp. 356 ff. See P. L. Reynolds, "Bonaventure on Gender and Godlikeness," *Downside Review* 106 (1988), pp. 176-79.

answer he now gives is quite different from that which he gave in the *De Genesi contra Manichaeos*.<sup>22</sup> What help might Adam have needed? It is unlikely that Adam would have needed assistance in cultivating the land, for he did not need to labour until after the Fall. In any case, even if he had needed assistance of this kind, another man would have been more helpful. Perhaps he was lonely, and needed the solace of a companion. But how much more agreeable would the companionship of another man have been, for two male friends are better fitted to share a common life and to converse together than a man and a woman.<sup>23</sup> It might be argued (as Augustine himself argued in previous works) that it was needful that one partner should command while the other obeyed, so that the domestic peace was not threatened by a contrariety of wills.<sup>24</sup> But this could have been the case if God had formed another man from Adam. The second man, having been made after Adam and formed from him, would have been by right subordinate to Adam. It follows that God made Eve to provide Adam with the means of sexual procreation.<sup>25</sup> But what was once a duty (an *officium*) is now a remedy, for the Church has spread into all nations of the earth and the duty to procreate is no longer urgent.<sup>26</sup>

What had caused Augustine to change his mind? His attitude to exegesis had changed in such a way that he now placed more emphasis upon the literal and historical sense. It is difficult to ascertain to what extent this was an autonomous development and to what extent it was conditioned by a shift of opinion regarding the goodness of the body and sexual procreation. The historical reasons for the latter shift are well known. Augustine wrote the *De bono coniugali* and the *De sancta virginitate* in response to the arguments of Jovinian, according

<sup>22</sup> *De Gen. ad litt.* IX.5, CSEL 28.1, p. 273.

<sup>23</sup> "Hoc et de solacio dici potest, si solitudinis fortasse taedebat. Quanto enim congruentius ad conuiuendum et et conloquendum duo amici pariter quam uir et mulier habitarent."

<sup>24</sup> "Quodsi oportebat alium iubendo, alium obsequendo pariter uiuere, ne contrariae uoluntates pacem cohabitantium perturbarent. . . ." Cf. *De Gen. c. Mani.* I.19(30), PL 34:187: "Erat enim prius casta conjunctio masculi et feminae; huius ad regendum, illius ab [*sic; i.e. ad*] obtemperandum accommodata."

<sup>25</sup> This does not mean that Eve was nothing more than a means of procreation. Augustine finds in procreation not the reason for Eve's existence but the reason why she was female. Since the female sex (in his view) is in other respects defective, procreation must be the reason.

<sup>26</sup> *De Gen. ad litt.* IX.7, CSEL 28.1, p. 275.

to whom celibacy and marriage were of equal merit.<sup>27</sup> Jovinian's position was condemned at councils around AD 390 in Rome and Milan under Siricius and Ambrose respectively.<sup>28</sup> But Augustine probably also intended the *De bono coniugali* to be a response to the debate between Jovinian and Jerome that took place in the 390s. Jovinian found the goodness of marriage affirmed in Genesis, and maintained that the ascetic movement of which Jerome was an adherent was tainted with Encratism and Manicheism. Jerome's response, his intemperate *Adversus Jovinianum*, went far too far, and seemed to make marriage something worthy of contempt by its very nature.<sup>29</sup> In the *De bono coniugali*, Augustine tried to redress the balance by showing on the one hand that sexual procreation was one of the good things created by God in the beginning, and on the other hand that marriage, while good, is not as good as celibacy.<sup>30</sup> Considered in this new light, Augustine's spiritual interpretation of the command to increase and multiply must have seemed to imply a denigration of the body and of carnal intercourse and procreation. At the very least, carnal life and procreation seemed alien to the original order of things, the order that God had found good. From this point of view, his early interpretation of Genesis 1–3, which he intended to dispel the criticisms of the Manichees, looked suspiciously dualistic itself. He needed to show not only that marriage was good and blessed, but also that sexual procreation was good and blessed.

Some scholars attribute Book IX of the *De Genesi ad litteram* to the earliest days of Augustine's anti-Pelagian period. Elizabeth Clark, however, has argued convincingly that his treatment of sexual division and procreation in that work was a response to the debate over Jovinian. According to Clark, Augustine probably wrote Book IX shortly after writing the *De bono coniugali*:

<sup>27</sup> See *Retractationes* II.22.1 and II.23, *CCL* 57, pp. 107 and 109.

<sup>28</sup> See Hefele-Leclercq, vol. 2.1, pp. 78–80.

<sup>29</sup> See J. N. D. Kelly, *Jerome* (1975), pp. 182–89; and E. A. Clark, "Heresy, asceticism, Adam and Eve," in *Ascetic Piety and Women's Faith* (1986), pp. 358–62. On the influence of the treatise in the twelfth century, see Ph. Delhaye, "Le dossier anti-matrimonial de l'*Adversus Jovinianum* et son influence sur quelques écrits latins du XIIe siècle," *Mediaeval Studies* 13 (1951), 65–86.

<sup>30</sup> See E. A. Clark, "Heresy, asceticism, Adam and Eve," in *Ascetic Piety and Women's Faith* (1986), pp. 366–68, on Augustine's responses in the *De bono coniugali* to Jovinian's arguments and his middle way between Jovinian and the Manichees.

that is, early in the first decade of the fifth century, and well before his first acquaintance with the teachings of Pelagius, which cannot have occurred before the end of AD 411.<sup>31</sup> Augustine's new approach was later confirmed by his involvement in the Pelagian controversy, during which he had cause to think carefully about the nature of the original state and about precisely what had gone wrong with it. He also had to defend himself against the painful charge of Manicheanism.<sup>32</sup> He wrote the *De nuptiis et concupiscentia* (dated AD 418–420) in response to the Pelagians, and especially to Julian, Bishop of Eclanum.<sup>33</sup> In the *Contra Iulianum*, written in AD 421 or 422, Augustine finds himself able to disown his earlier theory with a clear conscience, declaring: "we do not say, as you falsely accuse us, that the first married persons were so instituted that they might be married without the carnal intercourse of the two sexes."<sup>34</sup> He should perhaps have said, "we no longer say." In the *Retractationes* (AD 426–427), Augustine notes his spiritual interpretation of Genesis 1:28 in the *De Genesi contra Manichaeos* and rejects it.<sup>35</sup>

#### *Chaste marriage*

In Book I of the *De Genesi contra Manichaeos*, as we have seen, Augustine suggests that Adam and Eve were united spiritually and not carnally before the Fall. Theirs was a "chaste union" (*casta coniunctio*) such that one ruled and the other obeyed.<sup>36</sup> In Book II, when Augustine asks what help God formed Eve to provide, he answers that it was so that Adam might give birth to spiritual progeny, "the good works of divine praise." This would have been the fruit of a *spiritual union*. Adam would have ruled and Eve would have obeyed, for he would have been obedient to Wisdom and she to him. For this reason, there would have been domestic peace.<sup>37</sup>

<sup>31</sup> E. A. Clark, "Heresy, asceticism, Adam and Eve," in *Ascetic Piety and Women's Faith* (1986), 353–85.

<sup>32</sup> On the accusation of Manicheanism, see E. A. Clark, "Vitiating seeds and holy vessels: Augustine's Manichean past," in *Ascetic piety and women's faith* (1986), 291–349.

<sup>33</sup> See *ibid.*, pp. 295–97 and ff.

<sup>34</sup> *Contra Iulianum* V.12(47), *PL* 44:811.

<sup>35</sup> *Retractationes* I.10.2, *CCL* 57, pp. 30–31.

<sup>36</sup> *De Gen. c. Mani.* I.19(30), *PL* 34:187: "Erat enim prius casta conjunctio masculi et feminae; huius ad regendum, illius ab [*sic*; ad?] obtemperandum accommodata."

<sup>37</sup> *De Gen. c. Mani.* II.11(15), *PL* 34:204–05. On the natural order by

The perspective of the *De Genesi ad litteram* is remarkably different. Augustine does not deny that Adam and Eve were spiritually but not carnally united before the Fall, since, as it happened, sexual intercourse did not take place until after it, nor does he deny that Adam and Eve would have been good companions, but the emphasis and the perspective are new. He now argues that God formed Eve from Adam so that humankind could procreate. This was the help that Adam needed, for had Adam's need been that of solace and companionship, another man would have been preferable. Whereas Augustine had thought that Adam and Eve were spiritual creatures whose progeny was to be joy, peace and virtue, he now thinks that they were carnal beings whom God commanded in the beginning to beget children. His acceptance of sex and sexual procreation as part of the original, God-given order of things seems to have been at the expense of his estimation of the place of what might be called the spiritual relationship in marriage.

The two perspectives suggest different conceptions of marriage. If Adam and Eve were united spiritually before they were united carnally, then it seems that marriage is primarily a spiritual union. Just as the pre-lapsarian, spiritual marriage was historically prior to post-lapsarian, carnal marriage, so is spiritual union prior to carnal union within any marriage. In other words, marriage is essentially a spiritual relationship, and the carnal, procreative aspect of marriage is added to this relationship. From the later perspective, it seems that God instituted marriage for the sake of procreation. Procreation, in other words, is the *raison d'être* of marriage.

Perhaps because of its transitional place in the development of Augustine's thought on marriage, the *De bono coniugali* presents a distinctive theory of the nature and the *raison d'être* of the marital relationship. Augustine assumes that God made marriage for the sake of procreation, but he subordinates procreation itself to friendship (*amicitia*), arguing that God caused the human race to descend from one man because parenthood and kinship favour friendship.<sup>38</sup> Sexual intercourse is not one of those goods (such as wisdom, health and friendship) that we may seek for their own sake, but rather one of

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which wives should be subject to their husbands, see also *De nuptiis* I.10, CSEL 42, p. 222.

<sup>38</sup> *De bono coni.* 1, CSEL 41, p. 187. This would seem not to be universally true.



those (such as food and sleep) that we should seek for the sake of something else. When someone enjoys sexual intercourse for its own sake, there is always some sin, which may be either damnable or excusable (*venialis*) according to the circumstances.<sup>39</sup>

What of marriage itself? Because friendship is the end of marriage, the relationship that essentially constitutes marriage is itself a variety of friendship. Since husband and wife should walk through life side-by-side, it was fitting that God made Eve from Adam's side. This was the first form of companionship, the form from which all others would derive. "The first union of natural human fellowship [*societas*]," Augustine writes, "is that between man and wife."<sup>40</sup> But this fellowship is prior to sexual procreativity. Husband and wife are associated, Augustine says, first by their companionship and second by their progeny, which is the product not of their union *per se* but of sexual intercourse:

For those who walk together and together look wither they are walking are joined to one another side by side. What follows is the union of fellowship in children, which is the only worthy fruit not of the union [*coniunctio*] of man and woman but of sexual intercourse [*concubitus*]. For even without such intercourse [*commixtio*], there could have been in each sex a certain friendly and brotherly union [*amicalis quaedam et germana coniunctio*] between one who rules and another who obeys.<sup>41</sup>

It is this *amicalis et germana coniunctio* that I have called, for want of any better expression, the spiritual relationship. As we shall see, Augustine (rather like some modern feminists) believes that in our fallen condition, this relationship and sexual desire are mutually inimical.

Jesus affirmed that marriage is good by insisting on its indissolubility and by his presence at the wedding at Cana. But what is this good? Augustine's first answer in the *De bono coniugali* is that the good of marriage consists not only in procreation but also in the natural fellowship (*societas*) between partners of opposite sex. For this reason, when spouses mutually agree

<sup>39</sup> *Ibid.*, 9, pp. 199–200.

<sup>40</sup> *Ibid.*, 1, pp. 187: "Prima itaque naturalis humanae societatis copula vir et uxor est."

<sup>41</sup> *Ibid.*, 1, pp. 187–88: "Consequens est conexio societatis in filiis, qui unus honestus fructus est non coniunctionis maris et feminae, sed concubitus. Poterat enim esse in utroque sexu etiam sine tali commixtione alterius regentis, alterius obsequentis amicalis quaedam et germana coniunctio."

to continence, or when they have grown old and their ardour has died away and the possibility of begetting children has receded, and even if they have had no children or if their children have died, their relationship is nonetheless a true marriage. For inasmuch as their ardour decreases, their mutual charity may increase. "But now in a good albeit aged marriage, even if the ardour of youth [*ardor aetatis*] between a man and a woman has withered, yet the order of charity [*ordo caritatis*] between husband and wife thrives. . . ." <sup>42</sup>

In part, Augustine was appropriating for his own purposes a conception of marriage that had become manifest in the writings of the Roman Stoics of the first century AD. For whereas marriage had hitherto been considered a civic duty, moralists began to focus on the relationship itself. While emphasizing that sexual intercourse should be performed only for the sake of procreation, they stressed the need for friendship (*amicitia*) and concord or harmony. <sup>43</sup> Augustine's notion of a purely spiritual relationship within marriage, however, sprang from properly Christian ideas, among which were his early (although now discredited) conception of marriage before the Fall, and the example of Mary and Joseph. The Virgin Mary was never far from his mind in these contexts.

In treatises composed after AD 410, Augustine emphasizes that God made marriage for the sake of procreation and that the proper purpose of marriage now is to provide a remedy for lust. Nevertheless, the notion of a spiritual union in marriage arises whenever Augustine needs to argue that a sexual relationship is not a necessary condition for the existence of marriage. The topic usually arises when he considers Mary's marriage, <sup>44</sup> but as well as supporting the orthodox doctrine of Mary's perpetual virginity, he aims to make a moral point. Marriage need not involve a sexual relationship, and may flourish in the absence of one. Augustine points out that elderly spouses in whom the fires of lust have died down do not cease to be married, nor do those who have taken mutual vows of continence. Celibacy in marriage is honourable and can be profitable. He never suggests that one would in normal circumstances

<sup>42</sup> *Ibid.* 3, pp. 190–91. Cf. *De nupt. et conc.* I.12, *CSEL* 42, p. 224.

<sup>43</sup> See P. Veyne, "La famille et l'amour sous le haut-empire Romain," *Annales* 33 (1978), 35–36.

<sup>44</sup> See E. A. Clark, "'Adam's only companion': Augustine and the early Christian debate on marriage," in R. R. Edwards and S. Spector (eds.), *The Olde Daunce* (1991), pp. 22–28.

marry with the intention of remaining celibate, for if that were one's intention, one would be likely not to marry but to become a priest or a religious. Even if one finds one's self drawn unwillingly into marriage, one has to consider the debt to one's spouse as well as one's self. In marriage, each spouse provides as well as receives the remedy for lust. But there is no reason why spouses cannot become celibate once the remedy for lust is no longer required. In such contexts, Augustine sometimes echoes the consensualism of Roman law.

Not only does marriage endure when the spouses have mutually agreed to remain continent, but this makes the bond between them firmer. In the *De nuptiis et concupiscentia*, having explained how the benefit of sacrament pertains to marriage and how the marriage bond survives separation and divorce, Augustine adds:

Let it not be supposed that the conjugal bond should be broken between those who have mutually agreed to abstain from the use of carnal concupiscence. On the contrary, it will be firmer inasmuch as they have entered into an agreement together that must be observed with more endearment and more concord. [They are bound] not by the voluptuous ties of their bodies but by the voluntary affections of their minds.<sup>45</sup>

The angel did not lie when he said to Joseph, "Be not afraid to take your wife Mary" (Matt. 1:20), even though there had been no sexual intercourse between them. The Bible calls Mary "wife" (*coniux*) as soon as they had plighted their troth ("ex prima desponsationis fide"), even though Joseph had not nor would ever know her carnally.

A fuller statement of the same thesis appears in a sermon on the genealogy of Christ preached shortly after Christmas in AD 417 or 418. One should not suppose, Augustine argues, that because Joseph had not had intercourse with Mary, he was not Jesus' father, "as if it were libido that causes someone to be a wife, and not conjugal charity."<sup>46</sup> Many have taken St Paul's advice that those who have wives should behave as if they had none. They have mutually agreed in Christ's name to abstain from concupiscence, but not to abstain from mutual conjugal charity. The more they repress the former, the more

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<sup>45</sup> *De nupt. et conc.* I.12, CSEL 42, p. 224.

<sup>46</sup> *Sermo* 51.13(21), *PL* 38:344: "quasi uxorem libido faciat, et non charitas coniugalis." Cf. *Dig.* 24.1.32.13: "non enim coitus matrimonium facit, sed maritalis affectio."

firm the latter becomes. Such persons do not mingle carnally but they are joined together in their hearts. The wife is still subject to her husband, for this is seemly. Indeed, she is more subject to her husband inasmuch as she is chaste. And because the husband loves his wife "in honour and sanctification" (1 Thes. 4:4) and as his co-heir in grace, he truly loves her as Christ loves the Church (Eph. 5:25).<sup>47</sup> This is a curious reading of the passage on marriage in Ephesians 5, which emphasizes corporeity and carnal union, and in which erotic imagery is only just beneath the surface.

When Augustine answers Julian of Eclanum's criticisms of the *De nuptiis et concupiscentia*, the marriage of Mary and Joseph is an inevitable point of contention, for where Augustine argued that Mary was truly Joseph's wife, Julian objected that there was no marriage without sexual intercourse. It would follow from this, Augustine argues, that those spouses who cease to have intercourse because of old age must cease to be spouses and are *ipso facto* divorced. Must the old and infirm behave like youngsters, not sparing their tired bodies, in order to remain married?<sup>48</sup> And yet Julian himself has stated that Joseph took Mary as his wife "from the faith of the betrothal" (that is, as soon as they were betrothed). This faith remained inviolate. One should not dissolve "bond of conjugal faith" because the hope of sexual intercourse has gone.<sup>49</sup>

Julian has defined marriage as the union of bodies (*corporum commixtio*), but this is nonsense. Sexual intercourse and childbirth can take place outside marriage. Contrariwise, there can be marriage without sexual intercourse. If this were not so, spouses would cease to be married when they grew old and either became unable to perform the sexual act or, realizing that there is no hope of generating children, too ashamed to do it. Julian's definition is ill-considered. It would have been more tolerable, Augustine adds, if Julian had stated that marriages are not *begun* except through the union of bodies, since men take wives "for the sake of procreating children" and children cannot be generated except by means of sexual intercourse.<sup>50</sup>

In Augustine's view, there was such a thing as libidinous *amor*, but there could be no such thing as libidinous *caritas*.

<sup>47</sup> Cf. Jerome, *Adversus Iovinianum* I.16, *PL* 23:246A–B.

<sup>48</sup> *Contra Iulianum* V.12(46), *PL* 44:810.

<sup>49</sup> *Ibid.*, V.12(48), *PL* 44:811.

<sup>50</sup> *Ibid.*, V.16(62), *PL* 44:818.

One became the friend and companion of one's spouse to the extent that sexual desire and coitus no longer intruded. This conviction may have owed something to the custom of concubinage. In Augustine's view, at any rate, the only reason for taking a concubine was to satisfy sexual desire. Although he was faithful to his own concubine, he described their relationship as an arrangement made to satisfy sexual desire (*libidinosus amor*).<sup>51</sup> When she was sent back to Africa so that he could prepare for marriage, she vowed she would never take another man. Augustine was heartbroken, but because he was a slave of lust, and not a lover of marriage, he took another woman. The wound he received by parting from his former concubine remained and festered. We should say that he was in love with her, and would not think the worse of him for that, but he considers that he was bound to her only by desire. He deeply regretted entire affair.<sup>52</sup> Their bond was one of the flesh, not one of the spirit. Of the woman herself we are told nothing, not even her name, but as Peter Brown has remarked, "our curiosity about her is a very modern pre-occupation."<sup>53</sup> In Augustine's eyes, she was not so much a person as an object of carnal desire.

Augustine tends to regard the spiritual relationship as the very essence of marriage: in other words, that which must exist if there is a marriage, and without which there would not be a marriage. Thus he argues in the *De nuptiis et concupiscentia* that the angel did not lie when he said, "Fear not to take Mary your wife," because Mary:

is called wife from the first troth of the betrothal, although [Joseph] had not known her carnally nor was to do so. The name of "wife" was not destroyed nor did it remain as a lie, although there had not been nor was there going to be any sexual intercourse.<sup>54</sup>

Similarly, in his sermon on the genealogy of Christ, Augustine counters the argument that Joseph, because he did not have sexual intercourse with Jesus' mother, was not Jesus' father, with the response that it is not libido but conjugal charity that makes a marriage.<sup>55</sup>

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<sup>51</sup> *Conf.*, IV.2(2), CCL 27, p. 41.

<sup>52</sup> *Conf.*, VI.15(25), p. 90.

<sup>53</sup> P. Brown, *Augustine of Hippo* (1967), p. 61.

<sup>54</sup> *De nupt. et conc.* I.11, CSEL 42, p. 224. Cf. Isidore, *Etym.* IX.7.9, ed. Reydellet, p. 229.

<sup>55</sup> *Sermo* 51.13(21), PL 38:344: "quasi uxorem libido faciat, et non charitas

*Conclusions*

Although Augustine argues that marriage can thrive in the absence of a sexual relationship, it seems to me that his treatment of this spiritual relationship is largely negative. For while it is apparent what this relationship is not (since Augustine's depiction of libido is vivid), he gives the reader little sense of what it is. He sketched it out but did not know how to colour it in. This is not surprising, for he did not rate the possibilities for companionship and conversation between men and women very highly.<sup>56</sup> Elizabeth Clark argues that Augustine's "estimate of woman's secondary status" was one of the reasons for his "failure to develop fully the social and companionate theory of marriage."<sup>57</sup> This aspect of his mentality cannot be entirely put down to the culture of his day. As Clark points out, "Augustine never developed a circle of female friends with whom he shared scholarly and emotional concerns, as did Jerome and John Chrysostom."<sup>58</sup>

As far as we know, Augustine had close and deeply affecting relationships with only two women: his mother and his concubine. He learned to revile the latter relationship, and the former did not present a useful model for the "side by side" relationship of marriage. On a theoretical level, he set himself the impossible task of finding a relationship that was heterosexual inasmuch as it involved the union of a man and a woman, and yet asexual inasmuch as it existed independently of sexual desire and sexual union, and thrived only in the absence of these things. When he looked for the substance of this relationship, he could find nothing more than a certain orderly discipline in which the husband rules and the wife obeys.

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coniugalīs." Cf. Ulpian: "nuptias enim non concubitus sed consensus facit" (*Dig.* 35.1.15 and 50.17.30); and "non enim coitus matrimonium facit sed maritalis affectio" (*Dig.* 24.1.32.13).

<sup>56</sup> See *De Gen. ad litt.* IX.5, CSEL 28.1, p. 273.

<sup>57</sup> E. A. Clark, "'Adam's only companion': Augustine and the early Christian debate on marriage," in R. R. Edwards and S. Spector (eds.), *The Olde Daunce* (1991), p. 28.

<sup>58</sup> *Ibid.*, p. 29.

## CHAPTER TWELVE

### AUGUSTINE ON MARRIAGE AS A REMEDY

When Augustine wrote his treatise on the good of marriage (*De bono coniugali*), around the year 401, he was already tending toward the opinion that sexual procreation had been part of the original order of creation. He was soon to become firmly committed to it. His new perspective did nothing to lessen his pessimism about sexual activity and desire, for he always articulated that pessimism in terms of the Fall. The controversy with Pelagianism would soon confirm and darken his view of our fallen condition.

Augustine's chief aim in the *De bono coniugali*, however, was not to speculate about the original condition and our Fall from it, but rather to demonstrate the goodness of marriage. We know from the *Retractationes* that the treatise was a response to Jovinian,<sup>1</sup> but it is likely that Jerome's *Adversus Iovinianum* was in the background as well. Augustine was trying to find a middle way by emphasizing (against Jerome) the goodness of marriage while maintaining (against Jovinian) that celibacy was a higher calling. Furthermore, Augustine aimed to show that marriage was good even in this fallen world and even when the spouses were sexually active. His aim was not to justify some rare or ancient form of marriage, but rather marriage as it was actually practiced by normal Christian men and women.

The goodness of marriage, according to Augustine, consists principally in three *bona* or benefits: fidelity (*fides*), progeny (*proles*) and sacrament (*sacramentum*). The theory of the three benefits, having been adumbrated in the *De bono coniugali*, recurs in some form in most of Augustine's subsequent writing on marriage. It is because of these three benefits that marriage is good despite the evil that inevitably contaminates sexual congress.

Although Augustine often presents the benefits as a set of three, the kind of goodness that he attributes to fidelity and progeny is different from that which he attributes to sacrament. The benefits of fidelity and progeny are good, in his view, because they constitute a remedy for that wound in our

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<sup>1</sup> See *Retractationes* II.22.1, CCL 57, p. 109.

nature whose chief symptom is libido or carnal concupiscence. Their goodness is medicinal and utilitarian in nature. The benefit of sacrament may also be remedial, but Augustine does not explain it in this way. On the contrary, sacrament seems to belong to another order. It exists above and beyond and even despite of any utilitarian considerations. The Biblical basis for Augustine's theory divides along the same lines. His theory of the remedy came from 1 Corinthians 7, while his theory of the sacrament came chiefly from Jesus' treatment of divorce and remarriage in the synoptic gospels.

To understand how marriage is good as a remedy, we must first understand the nature of the disease it cures or assuages.

### *Fallen sexuality*

According to Augustine's mature opinion, sexual procreation was part of the original order instituted by God. God gave his blessing to it in Genesis 1:28. Nevertheless, while sexual procreation is intrinsically good, it became tainted with something evil in the Fall. This consideration leads Augustine to wonder, in Book XIV of the *City of God*, what sexual intercourse and procreation would have been like if sin had never entered into the world. There would surely have been no lust and no shame. There would have been no *libido* and no *ardor* in conception, just as there would have been no pain in childbirth. There would have been no inner struggle, no conflict of the rational will against desire, no division of the soul against itself. Whereas we now find the requisite motions difficult to control, so that they occur uninvited or fail to occur when one needs them, in Paradise they would have been subject to the control of the will, just as our hands and feet are subject to our will now.<sup>2</sup> The member of the body that sows human seed would have behaved in much the same way as a farmer's hand sowing seed in a field. Insemination would have taken place voluntarily and at the appropriate times with the intention of generating children. Augustine acknowledges, and even emphasizes, that this is foreign to our experience and is hard for us to imagine. But even now there are some who have extraordinary control over certain bodily movements. For example, there are persons who can waggle their ears; some

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<sup>2</sup> Augustine was evidently thinking of the male genitalia and the male libido, although his theory would apply in principle as well to women as to men.



can imitate the voices of other men, of birds and of beasts; some can shed tears at will; some can even sweat at will; and some can make melodies through their behinds.<sup>3</sup> Sex without sin would have been something like this.

Augustine maintained that in the fallen condition, the evil of concupiscence inevitably contaminated sexual intercourse, even within marriage, but he did not think that sexual intercourse was intrinsically evil. Nor did he consider that there was anything intrinsically wrong with possessing a fleshly body. In his mature opinion, sin itself could not always be attributed to the failure of the rational soul to dominate the flesh. He argued in Book XIV of the *City of God* that not all personal sins arose from the flesh, and pointed out that Satan, the arch sinner, was a spirit. Nevertheless, Augustine was convinced that the failure of the rational soul to master the flesh was one of the chief consequences of the Fall. Concupiscence, in his view, was literally a disorder, and nowhere was the disordination that arose in the Fall more apparent than in sex. Moreover, Augustine was convinced that it was by means of lust (*concupiscentia* or *libido*) that original sin passed from generation to generation. "Behold," says the Psalmist (Ps. 51:1), "I was brought forth in iniquity and in sin did my mother conceive me." It was for this reason that Christ was born of a virgin. While sexual intercourse was good *per se*, it had become tainted with an accidental but indelible evil because of the Fall.

The fallen nature of libido appeared in its true enormity in the moment of orgasm:

This [libido] not only overpowers the whole body, and not only overpowers one from without, but also from within, and it arouses [*commovet*] the whole person. For the affection of the mind [*animi affectio*] is combined and mixed with the appetite of the flesh, so that the result is a pleasure [*voluptas*] that is greater than any other experienced in the body, and so much so that at the moment when it reaches its climax, one's alertness, or the sentinel of one's thinking, as it were, is overwhelmed.<sup>4</sup>

It is not hard to understand why this momentary loss of rationality (which may seem to us desirable and therapeutic) seemed horrific to Augustine. He supposed that the rational part of the soul (the *mens*) was the part that was in God's

<sup>3</sup> *De civitate Dei* XIV.23–24, CCL 48, pp. 444–48.

<sup>4</sup> *Ibid.*, XIV.16, pp. 438–39.

image, for it is rationality that distinguishes *homo sapiens* from other animals. From Augustine's point of view, the overwhelming of reason by a carnal appetite was a kind of dehumanization or bestialism. This disobedience of the flesh in the inner world was exactly parallel to the disobedience of non-human forms of life in the outer world. Both were punishments for Adam's disobedience, for just as Adam had disobeyed his superior, so had his inferiors (including his flesh) become disobedient to him.

Augustine did not deny that some kind of sexual appetite would have existed even without sin, and he agreed with Julian of Eclanum's statement that there could be no propagation without "mutual appetite" and the natural act of sexual intercourse.<sup>5</sup> It is far from clear, however, what this appetite would have been. In particular, it is very difficult to see what place Augustine left for the sexual appetite of the animal part of human nature, since animal appetites (such as hunger and thirst) are by definition involuntary. In the Pelagians, and especially in Julian of Eclanum, he came across the notion that sexual desire was simply part of our nature as animals, and therefore as humans, and this led him to qualify his own position. While he still thought it probable that there would have been no *libido* or carnal concupiscence in Paradise, he conceded that there might have been libido, but with the proviso that it would not have been the same then as it was after the Fall.<sup>6</sup>

Augustine presents his qualified theory succinctly in the *Contra Iulianum*, where he writes:

But if no-one had sinned, sexual intercourse [*commixtio corporum*] for the sake of procreation would not have happened in the same way then as it happens now. Let it not be supposed that that most honourable happiness in Paradise was always in subjection to an aroused libido. Let it not be supposed that there was anything pertaining to that peace of mind and body which caused the original nature of man to be at war with itself. Therefore, if there was no necessity either to be subject to libido or to fight against it, then either there was no libido then, or it was not such as it is now. For now he who does not wish to be subject to libido must struggle against it, and he who neglects to struggle against it must be subject to it. Of these two things,

<sup>5</sup> *Contra Iulianum* V.16(62), PL 44:818.

<sup>6</sup> On the question of whether there was libido in Paradise, see É. Schmitt, *Le mariage chrétien dans l'œuvre de saint Augustin* (1983), pp. 96–105. On the terms *concupiscentia* and *libido* in Augustine, see Schmitt, pp. 95–96; and G. Bonner, *St Augustine of Hippo* (rev. ed., 1986), Appendix C, pp. 398–401.

one is grievous [*molestum*], albeit praiseworthy, while the other is vile [*turpis*] and wretched. Accordingly, in this age one of these things is necessary for the chaste, but in Paradise both of them were alien to the blessed.<sup>7</sup>

Augustine believes that the turpitude of post-lapsarian sexual intercourse is apparent not only in promiscuity and perversity but also in normal sexual relations between chaste married persons. Libido as it exists in the fallen condition is incompatible with peace of mind. One either succumbs to it and is led astray, or one controls it. The latter course is virtuous, but it is a kind of warfare. Moral struggles of this kind cannot have gone on in Paradise.

Augustine states his position most fully in a letter he writes to Atticus, Bishop of Constantinople, probably in the early 420s.<sup>8</sup> Here Augustine distinguishes between two kinds of concupiscence: *concupiscentia nuptiarum* and *concupiscentia carnis*. The Pelagians make the mistake of confusing these. The concupiscence of marriage is also the concupiscence of conjugal chastity, of the bond of fellowship (*concupiscentia vinculi socialis*), and of legitimate procreation. The chief characteristic of carnal concupiscence, on the contrary, is that it is not of itself ordained to procreation. It fights against the rational will and must be subdued by chastity in one of two ways: married folk use it well (that is, for procreation); and those who are devoted to continence do not use it at all. In carnal concupiscence, there is "only the desire for sexual intercourse," while in marital concupiscence, there is only "the office of generating."<sup>9</sup> The former produces a disordered motion (*motum inordinatum*) that may be used well in marriage, although it is evil in itself. Alternatively, it may be given free rein, so that, for example, a man may have sex with his wife whenever he feels so inclined, even when she is already pregnant. Clearly, neither alternative can have existed in Paradise.<sup>10</sup>

<sup>7</sup> *Contra Iulianum* V.16(62), *PL* 44:818.

<sup>8</sup> *Epist.* 6\*. The letter was discovered by Johannes Divjak, whose first edition of it is in *CSEL* 88, pp. 32 ff. A new edition, again by Divjak, is in *Oeuvres de saint Augustin* 46B (*Bibliothèque Augustinienne*, 1987), pp. 126 ff. While Divjak originally dated the letter to the period AD 416–417 (see *CSEL* 88, pp. LVI–LVII), Yves-Marie Duval has argued convincingly for a date between AD 420 and 425, and in any event not earlier than 420 (see *Oeuvres de saint Augustin* 46B, pp. 444 ff.).

<sup>9</sup> *Epist.* 6\*.5, *Oeuvres* 46B, pp. 130–32.

<sup>10</sup> *Ibid.*, 6, p. 134.

Before sin, therefore, either there was no carnal concupiscence, or there was a form of it that is very different from what exists now. If the former is true (and Augustine clearly prefers this alternative), there would have been only marital concupiscence, which would have preserved "the tranquil charity of the spouses." It would have commanded the genitals in the same way as the rational will commands the hands and feet. If there was carnal concupiscence, it would not have been the same as that which those who struggle against it to preserve chastity in marriage, in widowhood or in virginity find harmful and hateful.<sup>11</sup>

Part of Augustine's complex theory of fallen sexuality is a line of argument that we may summarize in the following way. Since libido or carnal concupiscence (at any rate as we know it) is a desire for coitus *per se*, and since the natural and proper end of coitus is procreation, it follows that one must restrain libido (as we know it) in the interests of virtue. In other words, coitus is something one should use for the sake of procreation, and not enjoy for its own sake, while libido leads us to enjoy coitus and to find our pleasure in it. For this reason, libido (as we know it) was not congruent with the tranquillity of Paradise.

Augustine cannot accept that libido is simply a natural instinct. Even if there was libido in Paradise, he reasons, this could not have been something that arose involuntarily and spontaneously. (In this respect, it would have been quite unlike hunger and thirst.) Augustine makes his position clear in the *Opus imperfectum*, the treatise against Julian on which he was working at the end of his life. The libido against which one must struggle if one is to avoid sin, he explains, cannot have existed in Paradise. Either there was no libido then, or if there was, it *neither preceded nor exceeded* the rational will.<sup>12</sup> He explains elsewhere that the alternatives are as follows: either there was no libido in Paradise, and the genitals would have been moved directly by the will; or there would have been a libido *that arose at the command of the will* when the spouses foresaw that it was time to have intercourse.<sup>13</sup> If there was

<sup>11</sup> *Ibid.*, 7, pp. 134 ff.

<sup>12</sup> *Opus imperfectum* I.122, CSEL 85.1, p. 253. See also *ibid.*, I.68, p. 75.

<sup>13</sup> *Contra duas epistulas Pelagianorum* I.34, CSEL 60, pp. 450–51: "aut tunc ad nutum voluntatis libido consurgeret quando esse concubitum necessarium casta prudentia praesensisset. . . ."

libido at all, it was merely an intermediary between the will and the reproductive motions. The will would have summoned the libido, and would not have answered its call.

Augustine assumes that one ought (ideally) to be able to claim entire responsibility for one's actions, and he fears those aspects of sexuality that seem to *happen to* the person: in other words, aspects that are passions rather than actions. Moreover, the lower parts of human nature (for example, the appetites) ought to be subject to the higher parts. Fallen concupiscence, from this point of view, is a consequence of a kind of rebellion of the flesh with its animal appetites and motions against the will or the *mens*.

What is the *concupiscentia nuptiarum* that Augustine posits in the letter to Atticus? It is not a healthy and unwounded form of carnal concupiscence, for Augustine distinguishes clearly between these things. Although *concupiscentia* normally denotes sexual desire in a pejorative manner, the possible semantic scope of the word is very wide. When Julian asks Augustine whether he still maintains that there would have been no concupiscence in marriage if there were no sin, he replies:

I did not say "there would have been no concupiscence," because there is also a praiseworthy spiritual concupiscence, by which one yearns for [*concupiscitur*] wisdom. What I said was: "there would have been no shameful concupiscence."<sup>14</sup>

Augustine has in mind Wisdom 6:21: "Therefore the desire of wisdom [*concupiscentia sapientiae*] leads to the everlasting kingdom." The argument is an evasive quibble and does not show Augustine at his best.

I take it that Augustine arrives at the idea of *concupiscentia nuptiarum* by means of an analogical transference of the notion of sexual desire. In other words, it is the spiritual analogue of carnal love. In his view, there probably was no carnal concupiscence in Paradise, but Adam nevertheless (in the language of the Authorized Version) "cleaved unto" his wife. Marital concupiscence is Augustine's spiritual relationship in another guise. In the letter to Atticus, Augustine equates marital concupiscence with a desire both for the marriage bond and for legitimate offspring, but while he often associates the spiritual relationship with the bond, he usually maintains that the spiritual relationship exists independently from coitus and

<sup>14</sup> *De nupt. et conc.* II.52, CSEL 42, p. 308.

procreation. Is this a fatal objection to the interpretation of *concupiscentia nuptiarum* that I have outlined above? I think not. The incompatibility between the spiritual relationship and coitus is a result of the Fall, and it would not have existed in Paradise. Moreover, it stands to reason that the marital union of Adam and Eve in Paradise was by nature a fecund union, since God commanded them to increase and multiply. It is a strange kind of speculation that leads one, by something like sublimation, to posit a non-carnal but carnally fecund union between man and woman, but the possibility of this union is the logical consequence of Augustine's premises.

*Marriage after the Fall and after Christ*

Augustine's ideas about the value and function of marriage presuppose his beliefs about fallen sexual intercourse. Although Mary and Joseph never consummated their marriage, Augustine recognizes that sexual intercourse and procreation are normal concomitants of marriage, especially in its early years. Someone who intended neither to beget children nor to have sex would normally not get married at all, and in this sense Mary's case was exceptional. Normally, Augustine assumes, one chooses between the vocations of celibacy and of marriage. But why choose marriage, and thereby choose to have a sexual relationship, when sexual intercourse is inevitably contaminated with evil? How can one justify this choice as one that is open to God-fearing persons? Augustine posits two reasons: first, to procreate and raise children, so that the City of God may be populated; second, to provide a remedy against concupiscence. The second reason has become apparent in the last age, the age initiated by Christ, for now we are no longer called upon to provide citizens for the City of God. In this age, the remedy against concupiscence subsumes the good of procreation.

Augustine repeatedly affirms that procreation is no longer necessary and that there is no longer a duty to procreate. The duty existed under the old dispensation, but now that the Church has gone out into all nations, the "time to refrain from embracing" has come (Eccles. 3:5).<sup>15</sup> At the root of this theory was a difference between the Old and the New Testaments. Whereas in the Old Testament procreation was a duty

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<sup>15</sup> *De bono coni.* 9–10, CSEL 41, pp. 200–02; *ibid.*, 15, pp. 207–08, and 17, p. 210; *De nupt. et conc.* I.14, CSEL 42, pp. 226–27; *De Gen. ad litt.* IX.7, CSEL 28.1, p. 275; *De adulterinis coniugiis* II.12, CSEL 41, pp. 395–97.

and a blessing, the New Testament sets little value upon it and treats celibacy as the ideal.

This theory of a new dispensation was not novel. Tertullian draws attention to the difference when he considers why it is no longer permissible to have several wives, as the Patriarchs did. He argues that the command to increase and multiply of Genesis 1:28 has been superseded by the counsel of 1 Corinthians 7:29, where St Paul says that time is short and that those with wives should behave as if they had none. For God commanded mankind "to increase and multiply and *fill the earth*." God encouraged marriage in the beginning, but he later made a new dispensation. It is generally true that concessions are made in the beginning and restrictions in the end. Likewise, a man plants a wood and allows it to grow up before cutting it down at last. As Jesus himself said, "the axe has been laid to the root of the tree" (Matt. 3:10).<sup>16</sup> The unstated premise of this argument is that the world is overcrowded. Tertullian believed that the earth could barely support the population of his era, and that disasters such as war, plague, famine and earthquakes were a kind of providential pruning of humankind.<sup>17</sup>

Jerome, in his treatise against Helvidius, adopted and elaborated Tertullian's theory. He explains that in comparing virginity and marriage, he does not imply any invidious comparison "between the saints of the Old Testament and those of the New": that is, between those who had wives and those who have entirely avoided the "embrace of women." A different rule applies now because of the different circumstances of our time. Under the old dispensation, God commanded humankind to increase and multiply and to fill the earth, and the barren woman was cursed. All persons married and were given in marriage, and having left their parents, they became one flesh with their spouses. But now, as St Paul teaches, the time is short, and those who have wives should behave as if they had none (1 Cor. 7:29). Marriage in itself is always spiritually disadvantageous to the spouses, and now procreation is no longer needed.<sup>18</sup> Paul counsels that the unmarried should

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<sup>16</sup> *De exhortatione castitatis* 6, ed. Moreschini, SC 319, pp. 88–90. See P. Matthei's remarks and references in Tertullian, *Le mariage unique*, SC 343, pp. 44–47.

<sup>17</sup> *De anima* 30.4, ed. Waszink (1947), p. 42. See also Waszink's commentary on p. 375.

<sup>18</sup> *Adv. Helvidium* 20, PL 23:213–14.

remain as they are because of the present distress (*necessitas*). And Jesus himself says: "Woe unto those who are with child, and who give suck in those days." What is the present distress? The world is full, Jerome answers, and the earth cannot sustain us ("iam plenus est orbis, terra nos non capit"). The wood grows up so that it may later be cut down, and the field is sown so that it may be reaped. Every day persons are cut down by war, taken away by disease and swallowed up by shipwreck.<sup>19</sup> Where Tertullian saw such disasters as a providential pruning of the population, Jerome sees them as signs of the times.

Augustine likewise adhered to an ascetic theory of a new dispensation. His involvement in the controversies over Jovinian and over Pelagianism confirmed both his opinion that celibacy was a better way than marriage and his pessimism about sexual intercourse. But where Tertullian and Jerome argued that the world was becoming over-populated, Augustine argued that the number of citizens who would be in God's city was fixed, and that sexual procreation was no longer needful because there was now a better way to reach this number.

Augustine writes in the *De bono coniugali* that in his own time "there is not the necessity to propagate that there was then," under the old dispensation.<sup>20</sup> In Book IX of the *De Genesi ad litteram*, having concluded that God introduced sexual difference for the sake of procreation, Augustine adds that what was once a duty (an *officium*) is now a remedy because multitudes are coming into the Church from all the nations of the world:

For whence would faithful and pious virginity have such great honour and merit before God if not that in our own time, which is the time to refrain from embracing, when a vast abundance from all peoples [*ex omnibus gentibus*] suffices to fill up the number of the saints [*sanctorum numerus*], the urge [*libido*] to experience base pleasure does not claim for itself what is no longer demanded by the necessity of obtaining sufficient progeny.<sup>21</sup>

Similarly, Augustine argues in the *De nuptiis et concupiscentia* that procreation was *officiosissima* for the saints of the old dispensation—that is, a matter of urgent or bounden duty—

<sup>19</sup> *Ibid.*, 21, PL 23:215.

<sup>20</sup> *De bono coni.* 17, CSEL 41, p. 210. Cf. *De adulterinis coniugiis* 12, CSEL 41, p. 395: "Erat enim tunc quaedam propagandi necessitas, quae nunc non est. . . ."

<sup>21</sup> *De Gen. ad litt.* IX.7, CSEL 28.1, p. 275–76.



because of the need to generate and conserve the people of God. Procreation is no longer a matter of the same necessity (*illa necessitas*), for an abundance of persons from all the nations is being spiritually generated. Then was the time to embrace; now is the time to refrain from embracing.<sup>22</sup>

In the passage cited above from the *De nuptiis*, Augustine says that procreation was necessary under the old dispensation so that the people of God could be generated *and conserved*. The necessity envisaged here seems to be that of maintaining the number of living saints: that is, those members of God's people who are still living in this world and who make up the Church Militant. Augustine provides no explanation as to why quantity, as well as quality, is important. When he refers to the number of the saints in the *De Genesi ad litteram*, he has in mind the theory that God has predetermined the number of the elect. He maintains that this number must be at least as much as the number of fallen angels, although it may be greater.<sup>23</sup> The *terminus ad quem* of history will be reached when the number has been attained. He argues in Book XIV of the *City of God* that if it were true that procreation could not have taken place until after sin, it would follow that sin was necessary to complete the number of the saints, which is unfitting. On the contrary, one must believe that even without sin a sufficient number of saints would have been generated for the City of God. The number generated in a world without sin would have been the same as that now being collected by the grace of God from the multitude of sinners.<sup>24</sup>

Augustine's chief explanation for the fact that procreation was no longer a bounden duty, therefore, was as follows. He probably believed that he was living in the last times and that the end would soon come. As St Paul had said, time was short. The delay that had intervened after Paul had said this would only have convinced Augustine that the end was very near indeed. There must still have been places left in the City of God, but Jesus Christ had made the Church accessible to the Gentiles, and persons were now coming into the Church by conversion and baptism from all the nations of the world. This was the crux of Augustine's argument. The number of the elect

<sup>22</sup> *De nupt. et conc.* I.14, CSEL 42, pp. 226–27.

<sup>23</sup> *Enchiridion* 9(29), CCL 46, p. 65; and *De civ. Dei* XXII.1, CCL 48, p. 807.

<sup>24</sup> *De civ. Dei* XIV.23, CCL 48, pp. 444–45.

could now be achieved, and achieved more quickly, by spiritual rather than sexual generation, by rebirth rather than birth.

Augustine says that we do not know what the predetermined number of the elect is.<sup>25</sup> Nor do we know how many saints have already been admitted. That God has predetermined the number of the elect he deduces not from any numerical observations, but from the premise that procreation was a duty under the old dispensation but not under the new. We learn this premise from the Bible and from the tradition of the Church. Augustine never explicitly formulates his theory, but it seems that in his view two factors work together to obviate the bounden duty to procreate. First, the number of the elect is fixed; second, large numbers of converts are entering the Church. He probably also believes that the number of saved persons is approaching its predetermined limit, and that this world will soon come to an end.

Those Christians who marry, have children and raise them as believers can have the satisfaction of knowing that they are helping to populate the City of God and to hasten thereby the end of this world of sorrow and pain. But because there is no need for sexual procreation to achieve this end, it would be better for all to remain celibate, other things being equal. The proper and sufficient reason for getting married is to obtain the remedy for lust, and not to procreate.

What would happen if everyone stopped generating children? Augustine considered this question in the *De bono coniugali*:

But I know what some may be murmuring. "What," they say, "would happen if all persons wished to abstain entirely from sexual intercourse?" Would that all did wish to do this, as long as they did so in charity "from a pure heart and a good conscience and sincere faith" [1 Tim. 1:5]. The City of God would be filled much more quickly so that the end of the world would be hastened.<sup>26</sup>

The question had been put on the agenda by Jovinian as an objection to the ascetics' preference for celibacy over marriage.<sup>27</sup> Augustine could not have supposed that ceasing to generate children could of itself have hastened the completion of the number of the elect. His point may simply have been that if the whole world abstained in the right spirit, all would *ipso*

<sup>25</sup> See *Enchiridion* 9(29), CCL 46, p. 65.

<sup>26</sup> *De bono coniugali* 10, CSEL 41, p. 201.

<sup>27</sup> See Jerome, *Adversus Iovinianum* I.36, PL 23:271 ff.

*facto* have become saints, so that there would have been a sufficient number to fill God's city. Or perhaps he reasoned that a Church which had become so saintly and militant that all its members became celibates would gather souls to herself at an even greater rate than she was already doing. Marriage and mission were mutually exclusive vocations. In any case, the situation was wildly hypothetical. The existence of carnal concupiscence would ensure that Christian babies would continue to be born as long as this world endured.

When considered in the context of what some of his contemporaries had said, Augustine's treatment of sexual procreation was a middle way. At one extreme was Ambrosiaster's conservative affirmation of the goodness of sexual procreation, while at the other was Jerome's radical and negative position. Ambrosiaster reasoned that human beings would continue to procreate as long as this world endured *because humankind was integral to the order of creation*. Because the irrational animals existed for the sake of humankind, the benediction "increase and multiply" applied to humankind as long as it applied to the other animals. The world could not partly continue and partly cease. It had to continue or cease as a whole. Of what use was a body if some of its members thrived while others atrophied?<sup>28</sup>

Ambrosiaster's argument implies a certain naturalism with regard to procreation. Human procreation is part of the natural order of things and will continue as long as the world continues. It will be soon enough to stop procreating when the world ceases. This probably represents the response of a conservative Roman cleric to the ascetic tendency of which Jerome was an adherent.<sup>29</sup> While Ambrosiaster emphasizes the place of human procreation within the continuity of nature, Jerome maintains that the time for procreating has passed. The former reaffirms the place of mankind in the natural world, while Jerome regards the world as a rapidly sinking ship from which we must escape.

Although Augustine adhered to the ascetic movement's theory of a new dispensation, he sought at the same time to avoid the excesses of Jerome's *Adversus Iovinianum*. His moderation becomes apparent in his use of the "good-better" model for

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<sup>28</sup> *Quaestiones* 127.4, CSEL 50, p. 400.

<sup>29</sup> See D. H. Hunter, "On the sin of Adam and Eve: a little-known defense of marriage and childbearing by Ambrosiaster," *Harvard Theological Review* 82 (1989), 283–99, esp. pp. 288–89.

comparing marriage and celibacy, a model derived from 1 Corinthians 7:38.<sup>30</sup> Tertullian generalized this formula by affirming that virginity should be preferred to marriage not as one prefers something good to something evil, but as one prefers something better to something good ("non ut malo bonum, sed ut bono melius").<sup>31</sup> This "good-better" model seems on the face of things to be an affirmation of the positive merit of marriage. It may even seem to make celibacy supererogatory. But this was hardly Tertullian's position. In his view, especially in his Montanist period, marriage can also be considered as a lesser evil.<sup>32</sup> If it is better to marry than to burn, marriage may be good only inasmuch as it prevents burning, and this does not present marriage itself in a very positive light. Again, marriage is good as a remedy against the evil of sexual desire and sexual pleasure; but remedies, such as the potions and operations of medicine, are usually things that are vile or even harmful in themselves and good only because of the worse evil they prevent.

Such was the opinion of Jerome. His aim in the treatise against Jovinian was to rebut the thesis that virginity and celibacy are not preferable to marriage and sexual intercourse. Jerome points out that Paul says that it is *good* for a man not to touch a woman, but only that it is *better* to marry than to burn. He reasons that it is better to marry because to burn is worse. If there were no carnal desire (*ardor libidinis*), Paul would not have said that it is better to marry. Marriage is not good *per se*, but only relatively good, just as it is better to have one eye than none. Marriage is good only because it is a lesser evil in respect of a greater evil. Jerome chooses for himself not the lesser evil of marriage but a way that is good in itself (*simplex per se bonum*).<sup>33</sup> He points out that Paul's statement, "he who joins his virgin in marriage does well," should not be separated from the remainder of the dictum: "he who does not join does better." He concludes:

Now where there is good and better, there good and better do not merit the same reward. And where there is more than one

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<sup>30</sup> *Vulgate*. "Igitur et qui matrimonio iungit virginem suam, bene facit: et qui non iungit, melius facit."

<sup>31</sup> *Adv. Marcionem* I.29.2, *CCL* 1, p. 473.

<sup>32</sup> See P. Mattei's remarks in his edition of the *De monogamia*, SC 343, pp. 52–63.

<sup>33</sup> *Adv. Iov.* I.9, *PL* 23:233A–B.

reward, there accordingly there are diverse gifts. The difference between marriage and virginity is as great as that between not sinning and doing well; or rather, to speak more lightly, as that between good and better.<sup>34</sup>

Augustine attempted to redress the balance in the *De bono coniugali* by emphasizing that marriage is good in itself and by providing a more positive interpretation of the "good-better" model. Continence is to marriage, he explains, what immortality is to health or what charity is to knowledge, and not what health is to sickness or knowledge is to vanity.<sup>35</sup> Nevertheless, the difference between Augustine and Jerome is only one of emphasis. Like Jerome, Augustine believes that marriage normally involves something vile, and that marriage is good only inasmuch as it prevents something even worse.

Marriage in our own time is good, but chiefly as a remedy. Indeed, it is only by virtue of its remedial properties that marriage is preferable to celibacy. As St Paul advised the community at Corinth, "it is good for a man not to touch a woman, but because of immorality each man should have his own wife and each woman her own husband" (1 Cor. 7:1–2).<sup>36</sup> Paul assumes that the Parousia is imminent. Time is short (v. 29), and the present order is passing away (v. 31). In such circumstances, the duty to procreate for the Lord no longer applies, while there is good reason to devote oneself to God without the distractions of married life (vv. 28, 32–35). It is striking that at no point in this discourse or indeed elsewhere in his writings does Paul argue that procreation justifies marriage. In 1 Timothy 2:15, we read that "woman will be saved through bearing children," but this is because she can expiate for the sin of Eve by the pain and travail of childbirth (see 1 Tim. 2:13–14 and cf. Gen. 3:16). Marriage is justified above all as a way to obviate the problem of sexual desire (1 Cor. 7:2), for "it is better to marry than to burn" (v. 9).

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<sup>34</sup> *Ibid.*, I.13, 243B. On the *Adversus Iovinianum* and the controversy to which it gave rise, see G. J. Campbell, "St Jerome's attitude towards marriage and women," *American Ecclesiastical Review* 143 (1960), 310–20 and 384–94.

<sup>35</sup> *De bono coni.* 8, CSEL 41, p. 198.

<sup>36</sup> The introductory remark ("Now concerning the matters about which you have written to me . . .") may indicate that the statement "it is good for a man not to touch a woman" expresses the opinion not of Paul but of some Corinthians. Nevertheless, Patristic and medieval exegetes assume that this is Paul's own opinion.

It follows that the remedy for lust about which Paul spoke to the Corinthians has taken the place of the "office" of the Old Testament. Hence Augustine explains in Book IX of the *De Genesi ad litteram* that while sexual difference was created for the sake of procreation, there is no longer any need to procreate because the Church has spread into all nations of the earth. The "time to embrace" has passed, and the "time to refrain from embracing" has come (Eccles. 3:5). Marriage is to be justified now only as a remedy:

... the weakness [*infirmitas*] by which both sexes are prone to fall into turpitude is rightly repaired by the honourable nature [*honestas*] of marriage, so that what was once a duty [*officium*] for the healthy is now a remedy for the sick.<sup>37</sup>

For this reason, the evil of concupiscence does not vitiate the good of marriage. On the contrary, the good inherent in marriage renders the evil of concupiscence excusable (*veniale*). The good of marriage consists in three things. The first is *fides* (fidelity). The second is *proles* (progeny): the procreation, rearing and religious education of children. The third Augustine calls *sacramentum*. Because of the third of these benefits, the partners in a marriage may not be separated and neither of them may remarry as long as the other lives, even for the sake of procreation.<sup>38</sup> Here Augustine refers the reader to the *De bono coniugali*, where he has already adumbrated the theory of the three goods or benefits (*bona*) of marriage.

#### *The benefits of marriage*

Marriage is a remedy, Augustine maintains, because the good of marriage repairs to some degree the evil of concupiscence and makes it excusable. It is time to consider how this remedy works. As we have seen, Augustine posits a threefold good: fidelity, progeny and sacrament. He often posits all three benefits together, but when Augustine explains how marriage works as a remedy, only the first two of these benefits are involved. He explains in the *De bono coniugali* that the benefit of fidelity (*fides*) consists in this: that neither spouse should have sex with a third party, and that each should observe the conjugal debt.<sup>39</sup> In this way, one may control incontinence, and libido

<sup>37</sup> *De Gen. ad litt.* IX.7, CSEL 28.1, pp. 275–76.

<sup>38</sup> *Ibid.*, p. 276.

<sup>39</sup> *De bono coni.* 4, CSEL 41, pp. 191–92.

becomes excusable. The benefit of progeny (*proles*) consists in the procreation, rearing and religious education of children. By virtue of this benefit, one may use incontinence and ardour not for their own sake but for the sake of procreating children. Parental affection restrains lust so that it may “burn as it were more bashfully.”<sup>40</sup>

A more developed version of the same theory appears in the *De nuptiis et concupiscentia* (AD 418–420). Here Augustine allows that if a couple can so control their lust that they have sex for the sake of progeny alone, then coitus is in no way blameworthy. Among these wholly righteous couples, the wound (*plaga*) remains, but it is a source of bashfulness and not of turpitude.<sup>41</sup> It was to avoid the effects of this wound that Jesus was born of a virgin. The notion of a residual wound enduring even when there is no culpability is analogous to that of the wound of original sin remaining even after baptism.

The source of Augustine’s idea that marriage makes concupiscence excusable or pardonable (*venialis*) is 1 Corinthians 7:6, where Paul, having explained the need to observe the conjugal debt, adds: “I say this by way of concession [*secundum veniam*], not of command.”<sup>42</sup> Augustine argues that it cannot be marriage that is conceded, for this would imply that marriage is a sin. Nor can it be sexual intercourse inasmuch as the latter is ordained to procreation. What is conceded is sexual intercourse performed within marriage to satisfy lust, lest serious sins should be committed. Marriage has the laudable property of making pardonable something that does not belong to its essence, namely lust.<sup>43</sup>

Augustine is realistic, albeit pessimistic, about lust. In this fallen condition, sexual intercourse cannot take place unless the aroused libido moves the sexual organs. Such is our tragic and pitiful condition. We might say, using the fluidic imagery that has prevailed in popular psychology thanks to Freud, that lust should be channeled into sexual procreation. But this fails to capture the technical notion of use (*uti*) in Augustine’s

<sup>40</sup> *Ibid.*, 3, p. 191.

<sup>41</sup> *De nupt. et conc.* I.13, CSEL 42, p. 226.

<sup>42</sup> The Old Latin version of the text quoted by Augustine has *secundum veniam* where the Vulgate has *secundum indulgentiam*. The former phrase (which one might translate as “by way of forgiveness”) puts the object in question (sexual intercourse) in a more negative light than the latter.

<sup>43</sup> *De nupt. et conc.* I.16, CSEL 42, p. 229; and *Epist.* 6\*.7, *Oeuvres* 46B, pp. 136–38. See also *De continentia* 27, CSEL 41, p. 177.

system. One uses something inasmuch as one employs it as a means to an end, while one enjoys something when one is pleased by it as an end in itself. The distinction can be employed on a number of levels, as Augustine shows in a brilliant and sublime exploration of this theme in the *De doctrina christiana*.<sup>44</sup> From an ultimate and strictly theological perspective, only God is a fit object for enjoyment, and all else should be used in his service or "referred" to him.<sup>45</sup> The pride of Lucifer was the first and archetypal sin because he made of himself a first principle.

From this elevated perspective, it seems that sexual intercourse must be performed in the service of God. The benefit of progeny consists in raising children for the Lord. Lust and sexual pleasure (*voluptas*) come between us and God, and for this reason St Paul assumes that one must abstain from sexual relations if one is to devote one's self to prayer. Needless to say, this line of argument begs a question, for it assumes that sexual pleasure within marriage cannot in itself be referred to the Creator in praise and thanksgiving. Perhaps the collection of erotic poems known as the Song of Songs is in the canon to show that this is possible,<sup>46</sup> but Augustine saw in the song not this message but a coded message about Christ and the Church.

Augustine neither expects nor demands that lust can ever be absent from sexual intercourse in the fallen state. He makes his position clear in his first treatise against Julian of Eclanum, in which he writes:

Then, quoting some other words of mine, you argue as if I said: "sexual desire [*libido*] is to be regarded as honourable when it is used in the service of married persons for the propagation of offspring." You can say what you like, but I never said this or thought it. How can sexual desire be honourable in its use when it is suppressed by the domination of the mind lest it should rise up into licentious excesses. Accordingly, we do not say that "the use of lust always entails some guilt." . . . For I say that to

<sup>44</sup> *De doctrina christiana* I, esp. 3(3)–6(6), CCL 32, pp. 8–10.

<sup>45</sup> See *ibid.*, 6(6), pp. 9–10. On Augustine's notion of referring creatures to their Creator, see P. L. Reynolds, "Threefold existence and illumination in Saint Bonaventure," *Franciscan Studies* 42 (1982), pp. 191–194.

<sup>46</sup> Cf. Brevard S. Childs, *Introduction to the Old Testament as Scripture* (1979), p. 575: "The Song is wisdom's reflection on the joyful and mysterious nature of love between a man and a woman within the institution of marriage. . . . The frequent assertion that the Song is a celebration of human love *per se* fails utterly to reckon with the canonical context. . . . The writer simply assumes the Hebrew order of the family . . . and seeks to explore and unravel its mysteries from within."



use lust is not always a sin because it is not a sin to use well something that is evil. From the fact that something is used well by a good man it does not always follow that the thing itself is good.<sup>47</sup>

Although one can harness libido in the service of procreation, and thereby avoid sin, libido itself (as least in its present condition) is evil. Augustine does not accept that a moderate and restrained carnal appetite for sex is innocent in the same way as a moderate and restrained appetite for food is innocent. He does seem to suggest this at one point in the *De bono coniugali*, but he dispels this impression in the *Retractationes*. In the earlier work, he writes:

What food is to the conservation of the human being, this is what sexual intercourse is to the conservation of humankind. Neither is lacking in a certain carnal delectation, but this cannot be libido when it is moderated and brought into the service of its natural use by a restraining temperance.<sup>48</sup>

He then compares promiscuity to eating forbidden foods, and "venial" sexual intercourse in marriage to the immoderate appetite for permissible foods. Commenting in the *Retractationes* on the passage quoted above, he explains that just as using good things in an evil way is evil, so using evil things (such as sexual desire) in a good way is good. What he meant to say in the *De bono coniugali* was that the good and right use of libido was not itself libido. (In other words, one may subsume one's libido under a non-libidinous intention.) Augustine adds that he has pursued this and related matters diligently in his writings against the Pelagian heretics.<sup>49</sup>

Because the evil of libido inevitably contaminates sexual intercourse after the Fall, one can avoid this evil either by avoiding sexual intercourse or by means of the benefits of progeny and fidelity. These make lust pardonable. But procreation in itself no longer justifies marital sex. The Patriarchs used lust and sexual intercourse because it was their duty to beget children. The command or benediction, "increase and multiply", was then in force. And because this was their intention, coitus entailed no culpability, although the wound (*plaga*) remained. Our own situation, now that the "time to refrain from embracing" has come, is different. It is not procreation

<sup>47</sup> *Contra Iulianum* V.16(60), *PL* 44:817.

<sup>48</sup> *De bono coniugali* 18, *CSEL* 41, p. 210.

<sup>49</sup> *Retractationes* II.22.2, *CCL* 57, p. 108.

that requires us to marry, but lust. This is not because the moral fibre of mankind has declined, but because those holy persons who would have been dutifully procreating under the old dispensation are now priests, religious, consecrated virgins and the like. This elite is already living the life of the world to come, in which there will be no marriage or giving in marriage. God instituted marriage for the sake of begetting children, but whereas the need to beget children was urgent in former times, it does not exist now. Among the Patriarchs, Augustine argues, "continence yielded to the office" because of the need to procreate, but in our own time "the marital bond remedies the vice of incontinence." For this reason, the Apostle does not say "if they have no children, let them marry," but rather "if they cannot be continent, let them marry" (1 Cor. 7:9). Procreation "compensates for what is conceded to incontinence by marrying," and so by means of the benefit of progeny, the evil of incontinence is made excusable.<sup>50</sup>

Augustine's analysis, it seems to me, implies that because one now marries to escape promiscuity, marriage rarely provides a complete remedy for the sin that attaches to the sexual act. Generally, it is only the infirm, the second class citizens of God's kingdom, who get married, and they cannot be expected to restrain their lust entirely. They are effectively bound at least occasionally to have sex for its own sake, rather than for the sake of procreation. This is in part why Augustine says that marriage makes sexual intercourse "venial." His main contention is that while lust *per se* is evil (*malum*), it can be used well, and so without sin. But he also doubts that married persons ever use it well enough to avoid some element of sin. The Church excuses them in the same way as one excuses naughty children as long as their behaviour stays within tolerable bounds.

Augustine's view of marriage was dark and pessimistic, but it was not really Manichean. If it is true that the Manichees were opposed to procreation rather than to sexual intercourse, and would tolerate the latter, at least among the *auditores*, provided that there was no issue, then Augustine had inverted their values.<sup>51</sup> In his opinion, sexual desire is tainted with evil,

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<sup>50</sup> *De adulterinis coniugiis* II.12, CSEL 41, pp. 395–96.

<sup>51</sup> See E. A. Clark, "'Adam's only companion': Augustine and the early Christian debate on marriage," in *The Olde Daunce* (1991), p. 20 (with references).

sexual intercourse done for its own sake is sinful, and contraception is a grave sin. Progeny, on the contrary, is part of the good that remedies the evil of concupiscence. While Augustine maintains in the *De bono coniugali* that procreation is good because kinship extends friendship,<sup>52</sup> in subsequent treatises he maintains that procreation is good above all, if not exclusively, as a remedy. The notion that there are social benefits pertaining to friendship that one may gain by having and raising children, benefits that belong neither to the office nor to the remedy, fades from his view. If he still believes in such benefits, he does not think that they are worth the trouble of arousing the demon of lust in persons who do not need a remedy for it.

Augustine's affirmation of the goodness of marriage offers only cold comfort to married persons. For while they may be grateful for the remedy marriage offers, they cannot be expected even to imagine, let alone aspire to, the wholly good manner of using and experiencing sexual intercourse that God created in the beginning. Augustine does not expect them even to try to attain this. They will find to their infinite regret and shame that what Augustine considers to be the defective and vile aspect of sexuality is what attracts and holds them to each other, what motivates them to have sex, and even what makes coitus mechanically possible.

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<sup>52</sup> *De bono coni.* 1, CSEL 41, pp. 187, and 9, pp. 199–200.

## CHAPTER THIRTEEN

### AUGUSTINE ON THE SACRAMENT IN MARRIAGE

The third of Augustine's three goods or benefits of marriage is sacrament:

... not only fecundity, whose fruit is in progeny, nor only chastity, whose bond is fidelity, but also a certain sacrament of marriage is commended to married believers. Hence the Apostle said, "Husbands, love your wives, even as Christ loved the Church."<sup>1</sup>

"Sacrament," in Augustine's time as in our own, is a powerful term. While its meaning may be unclear and controvertible, its application is of great consequence. At the very least, saying that something is a sacrament implies that the thing is holy and special and that there is more to it than meets the eye. Moreover, the application may determine what is permitted and what is forbidden.

It would be misleading to say that Augustine himself considered marriage to be one of the sacraments, or even to say that he called marriage a sacrament. Augustine did not put marriage in the same category as eucharist and baptism, although he compared marriage to baptism. It is perhaps better to say that he posited a sacrament *in* marriage than to say that he posited a sacrament *of* marriage. The idea of sacrament was a guiding principle in much of Augustine's writing about marriage, but he had no clear and fixed conception of the nature of this sacrament. There is no single definition of *sacramentum* with which one may gloss every occurrence of this word in his writings about marriage. What we find instead is a range of related ideas corresponding to a range of connotations that the word had acquired from various contexts.

Insofar as a sacrament is simply a "sacred sign" (which is one of Augustine's definitions), then marriage is indeed a sacrament of Christ's union with the Church. Curiously enough, there are very few texts in which Augustine unequivocally calls marriage a sacrament in this broad sense.<sup>2</sup> In any case, the

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<sup>1</sup> *De nupt. et conc.* I.11, CSEL 42, p. 222.

<sup>2</sup> One exception is *Contra adversarium legis et prophetarum* II.9(34), CCL 49,

fact that marriage is a sacred sign does not in itself place it in the same genus as baptism and eucharist. The vine and the mustard seed, incense and altar-candles, holy water and the crucifix: all are equally "sacraments" in this sense. Augustine also uses the word *sacramentum* to mean "rite" (whether pagan, Hebrew or Christian), but he never calls marriage a sacrament in this sense or includes marriage among the sacramental rites of Christianity.<sup>3</sup> He says nothing about the nuptial liturgy. What he does repeatedly affirm is that there are three benefits (*bona*) of marriage, and one of these, as we have noted, he calls *sacramentum*. This *sacramentum* is closely related to the marriage bond (*vinculum*). It is because of the sacrament that a married couple can never be separated, except on the ground of fornication, and that neither can remarry under any circumstances as long as the other lives.

The crux of Augustine's theory of the sacrament in marriage is the premise that marriage is indissoluble in the Church. That Christians alone observe the law of indissolubility is as important to Augustine as the existence of indissolubility *per se*. Although Jesus seems merely to have confirmed and restored the inseparability that had belonged to marriage from the beginning, Augustine repeatedly affirms that such inseparability is to be found only in the Church; or, as he prefers to say, only "in the city of our God, in his holy mountain" (a reference to Psalm 47). The "law of this world" permits divorce and remarriage, and so did Moses, because of the Israelites' hardness of heart, but the "law of the Gospel" or the "divine rule" forbids remarriage after divorce.<sup>4</sup>

Did Augustine maintain that marriage was indissoluble only in the Church? Or did he suppose that while marriage was universally indissoluble, only Christians observed its indissolubility?<sup>5</sup> This is a reasonable question, and it is one that Western canon law would later address, but I do not think that it is one that Augustine addresses or one that we may address within the terms of Augustine's theory of marriage. There are hints

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p. 119, where Augustine writes "tantae rei sacramenta, id est, sacra signa" in reference to Eph. 5:32.

<sup>3</sup> See É. Schmitt, *Le mariage chrétien* (1983), pp. 218–20.

<sup>4</sup> *De bono coni.* 7, CSEL 41, p. 197; *De nupt. et conc.* I.11, CSEL 42, p. 223.

<sup>5</sup> Roman Catholic canon law has taken a curious middle way here by affirming both that marriage is indissoluble by the natural law and that the marriage of non-Christians does not have the same absolute indissolubility as the marriage of Christians.

here and there by means of which we might attempt to answer the question on Augustine's behalf, but never conclusively. If I am right about this, we should admit that the question itself, when asked about Augustine, is inappropriate.

Why does Augustine call the third benefit a sacrament? Many reasons might be found, but the chief ones are these. First, the word connotes a permanent personal bond. This is because in classical usage the word's denotations pertained to oaths and pledges. In particular, *sacramentum* denoted the military oath of allegiance and by extension the obligation consequent upon the oath. For this reason, *sacramentum* could denote a bond created by an oath or by a vow. Lactantius, for example, arguing that husbands should be faithful to their wives, says that the husband should be content to observe exclusively "the sacraments of a chaste and inviolate bed." Here the word *sacramenta* refers indeterminately to the marriage vows and to what Augustine calls *fides*: that is, the obligation to remain faithful and to observe the conjugal debt.<sup>6</sup> Lactantius is saying, in other words, that husbands should not violate their marriage vows. Marriage itself can be regarded as a *sacramentum* in the sense of a vowed bond. Ambrose may be using the word in this sense when he exhorts men to abstain from adultery lest they show themselves to be "unworthy of the sacrament."<sup>7</sup>

Second, Augustine posited an analogy between the permanence of marriage and the permanence of baptism and ordination, and in the latter cases he calls what endures a *sacramentum*. Third, the bond in marriage is a "sacred sign" of Christ's union with the Church. Fourth, the application of the word *sacramentum* to marriage is due in part to the influence of Ephesians 5:32.

#### *The influence of Ephesians 5:32*

Whenever a theologian applies the word *sacramentum* to marriage, Ephesians 5:32 must be implicated in some way. Paul (as we may refer to the letter's author) argues that we should regard the union between Christ and the Church as a model for marriage. Husbands should love their wives as Christ loved the Church, and they should love their wives as their own bodies because we are members of his body, being from

<sup>6</sup> Lactantius, *Epitome* 61, CSEL 19, p. 748.

<sup>7</sup> Ambrose, *De Abraham* I.4.25, CSEL 32.1, p. 520.

his flesh and from his bone (vv. 25 and 29). Here the author quotes Genesis 2:24—"For this reason a man shall leave his father and mother and cleave unto his wife, and they shall be two in one flesh"—and then comments: "This mystery is a great one, and I am saying that it refers to Christ and the Church."<sup>8</sup>

The original text speaks of a great *mystêrion*: that is to say, some truth about Jesus Christ that was once hidden and has at last been revealed. The author may have been referring either to the text of Genesis 2:24 or to the union between Christ and the Church. It is unlikely that he was referring to marriage. In the Latin versions of the New Testament, the word *mystêrion* was translated, with apparent indifference, sometimes by *mysterium* and sometimes by *sacramentum*. As it happened, *sacramentum* was the usual translation in the case of Ephesians 5:32 (although *mysterium* occurred also).

Augustine's Latin predecessors supposed that Ephesians 5:32 affirmed that the dictum from Genesis quoted in verse 31 was a prophecy of Christ and of the union he would establish with his Church. The *sacramentum* from this point of view was either the prophecy itself or the mystery to which it referred. There was good reason to interpret the text in this way. In the second of the two accounts of creation in Genesis, the story of humankind begins with one man, Adam, alone in Paradise. God declares that it is not good for Adam to be alone, and that he will make a "help meet for him," as the Authorized Version has it (Gen. 2:18). This phrase (which introduced the word "helpmeet" into the English language) serves very well as a translation of the Vulgate's *adiutorium simile sibi*. God makes the beasts of the earth and leads them to Adam, who names them, but because none of these is suitable (2:20), God makes a companion from Adam's own body. He puts Adam into a deep sleep, and having removed one of his ribs, fashions Eve from it. When Eve is brought to Adam, he recognizes her as one of his own kind, saying (2:23): "This is now bone of my bones and flesh of my flesh; she shall be called woman [*virago*] because she was taken out of man." The following verse comments (2:24): "For this reason a man will leave his father and mother and will cleave unto his wife and they will be two in one flesh."

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<sup>8</sup> RSV.

Four texts in the New Testament invoke this gloss on the creation of Eve from Adam (i.e., Genesis 2:24). In Matthew 19:5 and Mark 10:7–8, Jesus himself quotes it to prove that divorce did not exist in the beginning, and that no man should separate what God has joined. Paul uses the text in 1 Corinthians 6:16 as an argument against consorting with prostitutes. A man cannot be both one flesh with a whore and one spirit with Christ. Ephesians 5:31–32 refers the text to the union between Christ and the Church.

The use of the text in Ephesians was the chief source of the belief that it contained a prophecy, but other aspects of the story of Eve's formation corroborated this belief. Exegetes saw Adam as a type of Christ, the new Adam, and Eve as a type of the Church. Adam's sleep prefigured Christ's death on the cross. Just as Christ was pierced in the side of his body, from which flowed water and blood, so was a rib removed from Adam's side and fashioned into Eve. The water and blood were tokens of baptism and eucharist and of the grace that God bestows by means of Christ's passion and merit. By Christ's incarnation and death, God formed the Church of the New Covenant as the spouse of Christ. John Chrysostom outlined this allegory,<sup>9</sup> and Augustine elaborates it in several passages.<sup>10</sup>

There is another, more decisive factor to be considered. In its original context, the verse seems to be an editorial gloss. In Matthew 19:4–5, however, Jesus attributes the statement to God, saying that he who made mankind in the beginning (namely, God) said, "For this reason a man will leave his father and mother and will cleave unto his wife and they will be two in one flesh." The Fathers were aware of this, but they could also ascribe the dictum, without contradiction, to Adam, for they believed that Adam was prophesying. God was speaking through Adam. The text itself suggested this, for God had previously sent Adam into what the original Hebrew calls a

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<sup>9</sup> *Catecheses ad illuminandos*, third series, *Hom. 3 "Ad neophytos,"* 17–18, ed. Wenger, SC 50, p. 176.

<sup>10</sup> *De Genesi contra Manichaeos* 24 (57), PL 34:215–16; *In Iohannis evangelium* 9.10, CCL 36, pp. 96–97; *ibid.*, 120.2, p. 661; *Enarr. in Ps.* 56.11, CCL 39, p. 701; *Enarr. in Ps.* 126.7, CCL 40, p. 1862. See also *In epist. Iohannis ad Parthos* 2.2, PL 35:1990; and *Sermo* 336, 5(5), PL 38:1474–75. Cf. Isidore, *Allegoriae* n. 4, PL 83:99: "Eva designat Ecclesiam factam per mysterium lavacri, quae de latere in cruce morientis Christi fluxit, sicut Eva de costa hominis dormientis." Hugh of St Victor's adoption of this interpretation in the 12th century confirmed the popularity of this theme in the high Middle Ages: see Hugh, *De sacramentis* 1.6.36, PL 176:284.



*tardemah* ("deep sleep"). The word *tardemah* became *ekstasis* in the Septuagint. The Fathers reasoned that Adam uttered his soliloquy on coming out of an ecstasy or trance. There was good reason to believe that this sleep was some special, spiritual state, and that Adam was not merely given a general anaesthetic before undergoing a serious operation. First, an anaesthetic would not have been necessary in Paradise. Second, we read in Genesis 15:12 that God sent Abram into a deep sleep (again *tardemah* or *ekstasis*) before revealing what was going to happen to Abram's descendants and what was to be God's covenant with them. Scripture associates this form of deep sleep with prophecy.

The use of the word *ekstasis* would not in itself have dictated that Adam must have been prophesying. Indeed, Philo Judaeus distinguishes the kind of ecstasy that Adam underwent in Genesis 2:21 from that which Abram experienced in Genesis 15:12. Commenting on the latter text, he argues that while Abram's ecstasy was a prophetic trance or divine possession, Adam's was merely a condition of mental passivity and tranquillity.<sup>11</sup> It seems to have been Greek patristic authors who assimilated Adam's ecstasy to Abram's and reasoned that Adam had uttered in Genesis 2:23 what had been revealed to him in an ecstatic trance.<sup>12</sup> Philo had no particular reason to regard Genesis 2:24 as a prophecy, but Christian authors, being mindful of Ephesians 5:32, did. Given Paul's lead in this matter, everything fell beautifully into place.

Where the Septuagint has *ekstasis* in Genesis 2:21, the Vulgate has a less evocative term, *sopor* ("deep sleep" or "stupefaction"). Here the Vulgate follows some traditions of the *Vetus Latina*, although the evidence of patristic sources shows that other translations existed, including *ecstasis* as well as *stupor* and *somnum*.<sup>13</sup> But the theory that Adam's sleep was a prophetic trance was well known in the West. Tertullian reasoned that Adam must have been temporarily translated from a psychic to a pneumatic condition. Immediately after reverting to his normal, psychic condition, Adam uttered the words of vv. 23–24 as a prophecy of Christ and the Church, and the meaning of these words was later revealed by Paul. Tertullian

<sup>11</sup> *Quis rerum divinarum heres* 249–58 and ff. (Loeb edition, vol. 4, pp. 408 ff.).

<sup>12</sup> Cf. Epiphanius, *Adversus haereses*, PG 41:864B–D.

<sup>13</sup> See *Vetus Latina*, vol. 2 (1951), p. 51.

seems to have believed that Adam himself did not know the deeper significance of what he said,<sup>14</sup> but he reasoned that the *ecstasis* or *amentia* which Adam underwent was a state associated with the prophetic power bestowed by the Holy Spirit.<sup>15</sup> From the evidence of a passage in the *De ieiunio*, it seems that in his view one might induce this condition by fasting.<sup>16</sup>

In Tertullian, Ambrose and Augustine, the notion that Adam's dictum was a prophecy and that the first marriage was a type of Christ's union with the Church passes over into the notion that this union is the exemplar of marriage itself, as it is practised now by married Christians. The first notion merges imperceptibly into the second. In these writers, a certain haze of mystery surrounds marriage inasmuch as it refers to or symbolizes Christ's union with the Church. When one is on the threshold of the mystical marriage, in which the Church is the spouse of Christ, it becomes unclear whether we are talking about a prophetic type or about an ever present mystery, and unclear even whether we are talking about the Church's marriage to Christ or about marriages between men and women in the Church.

A version of the prophetic interpretation of Ephesians 5:32 occurs in Augustine's *De Genesi ad litteram*. It may be noted that Augustine quotes variant readings of Genesis 2:21 in this treatise. In Book VI, in a quotation of Genesis 2:18–22, he calls Adam's state *mentis alienatio*. At the beginning of Book IX, in a quotation of vv. 18–24, the word he uses is *extasis*.<sup>17</sup> Augustine says in Book IX that Adam became in his ecstasy a member of the court of the angels and entered the sanctuary of God. When he awoke and saw Eve, he was filled with the spirit of prophecy and annunciated (*eructuavit*) the great sacrament that St Paul commends in Ephesians 5:32: "For this

<sup>14</sup> See note in J. H. Waszink's edition of Tertullian's *De anima* (Amsterdam, 1947), p. 198.

<sup>15</sup> *De anima* 11.4, CCL 2, p. 797: "Nam etsi Adam statim prophetauit magnum illud sacramentum in Christum et ecclesiam: hoc nunc [etc., vv. 23–24] . . . , accidentiam spiritus passus est: cecidit enim ecstasis super illum, sancti spiritus uis operatrix prophetiae." *Ibid.*, 21.2, p. 813: "Si quia prophetauit magnum illud sacramentum in Christum et ecclesiam: hoc os [etc., vv. 23–24] . . . , hoc postea obuenerit, cum in illum deus amentiam immisit, spiritalem uim, qua constat prophetia." *De ieiunio* 3.2, CCL 2, p. 1259: "Verum et ipse tunc in psychicum reuersus post ecstasin spiritalem, in qua magnum illud sacramentum in Christum et ecclesiam prophetauerat. . . ."

<sup>16</sup> *Ibid.* See Waszink's note in Tertullian, *De anima* (1947), pp. 197–98.

<sup>17</sup> *De Genesi ad litteram* VI.5 and IX.1, CSEL 28.1, pp. 175 and 268.

reason a man will leave his father and mother and will cleave unto his wife and they will be two in one flesh."<sup>18</sup> The great sacrament is either Adam's dictum itself or, more subtly, the mystery of the incarnation insofar as Adam gave expression to it. Adam entered the sanctuary of God because the things attributable to grace, and in particular the mystery of Christ to which St Paul refers in Ephesians 3:8–11, cannot have pre-existed as potencies or seminal reasons in nature. The hidden causes of such things constitute "the plan of the mystery hidden for ages in God who created all things" (Eph. 3:10). Moreover, Augustine argues, it was fitting that those events that in a special way foreshadowed such things, including Eve's formation from one of Adam's ribs, should also have had their hidden causes in God alone. Adam became privy to this mystery and gave utterance to it. In one and the same moment, he understood the meaning of his marriage to Eve, he instituted marriage and he prophesied the Incarnation.

Augustine seems to identify the *sacramentum* with Adam's dictum in a passage at the beginning of the *De Genesi ad litteram*, where he notes that some things in Scripture must be interpreted figuratively:

For no Christian will dare to deny that [the things in Scripture] should be interpreted figuratively when he attends to the Apostle saying, "Now all these things happened to them as figures" [1 Cor. 10:11], and [when he hears him] commending that great sacrament in Christ and in the Church that is written in Genesis: "and they shall be two in one flesh."<sup>19</sup>

Similarly, in the commentary on John's gospel, Augustine asks, "What is this great sacrament: they shall be two in one flesh?" By way of an answer he explains how the story of Eve's formation prefigures that of the Church's formation.<sup>20</sup>

A closely related interpretation occurs in the *Contra adversarium legis et prophetarum* (dated AD 419). Here Augustine defends St Paul's use of carnal and sexual things as figures for the mysteries of the incarnation. The Apostle interpreted Abraham's begetting of a child through Sarah as a figure of the formation of the Church (Gal. 4:22–26), even though the focus of

<sup>18</sup> *De Gen. ad litt.* IX.19, p. 294.

<sup>19</sup> *Ibid.*, I.1, p. 1–2: "... attendens apostolum ... illud, quod in Genesi scriptum est: 'et erunt duo in carne una,' magnum sacramentum commendantem in Christo et in ecclesia."

<sup>20</sup> *Tract. in Ioh.* 9.10, CCL 36, p. 96.

this figure is an act of sexual intercourse (*concubitus coniugal*). Again, after saying that man and woman "will be two in one flesh," Paul adds, "This sacrament is great, I say, in Christ and in the Church." Augustine describes both of these figures as sacraments, adding: "that is, sacred signs." He likens his adversary, who is scandalized by such figures, to those who said "this is a hard saying, who can listen to it?" when Jesus commanded his followers to drink his blood and eat his flesh.<sup>21</sup> The comparison with the story of Sarah and Hagar shows that Augustine here regards marriage qua sacrament chiefly as one of the types of the Old Testament. The great sacrament, from this point of view, is marriage inasmuch as it was (and perhaps still is) a figure of Christ's union with the Church.

The recognition that marriage is a figure or a type of Christ's union with the Church may entail that it deserves respect by virtue of what it signifies. Tertullian, in a difficult but interesting passage of the *Adversus Marcionem*, implies that marriage must be honourable because it is an image of something honourable (although he is more concerned here with defending the goodness of the flesh than that of marriage). Just as a man will love and honour the image of his bride, he argues, so the likeness of a thing shares in the honour due to the thing itself. Tertullian concludes that the Apostle does not set aside the *sacramentum* in Ephesians 5:32 but rather interprets it.<sup>22</sup> Nevertheless, the fact that something is a prophetic type or a sign of something holy does not in itself entail that it is holy. If it did, Christians would venerate rocks. The Fathers consider that marriage in some way shares the holiness of Christ's union with the Church. Moreover, married persons are called upon to emulate this union. In the *De monogamia*, Tertullian cites Ephesians 5:32 to show that those who are unable to follow the preferable path of virginity should at least imitate by their monogamy of the flesh Christ's spiritual monogamy with the Church.<sup>23</sup>

That marriage was thought to be more than a mere figure or symbol of Christ's union with the Church also owes much

<sup>21</sup> *Contra adversarium legis et prophetarum* II.9(34), CCL 49, p. 119.

<sup>22</sup> *Adv. Marcionem* 5.18, ed. Evans (1972), p. 626 (or CCL 1, p. 719).

<sup>23</sup> *De monogamia* 5.7, ed. P. Mattei, SC 343, p. 152: "Si uero non sufficis, monogamus incurrit in spiritu, unam habens ecclesiam sponsam, secundum figuram quam apostolus in illud magnum sacramentum interpretatur in Christum et ecclesiam, competentes carnali monogamiae per spiritalem. Vides igitur quemadmodum etiam in Christo nouans censum non possis eum sine monogamiae professione deferre, nisi carne sis quod spiritu ille est. . . ."

the fifth chapter of Ephesians. For although verse 32 may be interpreted as an affirmation that the dictum quoted in verse 31 was a prophecy, the chief topic of the discourse is not the mystical union but marriage. The fifth chapter of Ephesians uses the mystical marriage between Christ and the Church to explain what Christian marriage should be like.

In one remarkable passage, Augustine assumes that it is not temporal marriage that is the great sacrament but rather the mystical marriage between Christ and the Church. Temporal marriage, on the contrary, is a little version or mode of the same sacrament. In other words, marriage is a great sacrament insofar as it *exists between* Christ and the Church. Thus, having cited the verse in question, he argues that "what is great in Christ and in the Church is very small in individual husbands and wives, but is nevertheless a sacrament of an inseparable union."<sup>24</sup>

This interpretation depends upon the precise wording of the verse. Several translations of the final phrase of this verse (*eis Christon kai eis tēn ekklesian*) occur in the Latin versions.<sup>25</sup> One reading, which we find in Tertullian, follows the letter of the Greek and uses an *in-plus-accusative* construction: "in Christum et Ecclesiam." Now, the obvious meaning of *in-plus-accusative* in this context is "referring to." The sacrament would then be the dictum spoken by Adam, or rather by God through Adam. Tertullian sometimes takes Ephesians 5:32 to mean that Genesis 2:24 ("For this reason a man will leave his father and mother," etc.) is a prophetic reference to Christ's union with the Church. Similarly, he writes that Paul interprets the dictum *in* (that is, as a reference to) this union.<sup>26</sup> Another version has "de Christo et ecclesia."<sup>27</sup> According to this version, again, Ephesians 5:32 says that Adam's dictum is about Christ and the Church. The associations of the word *sacramentum* are complex, however, for it retains even in these contexts the sense of "mystery" in patristic Latin, and the union between Christ and the Church is itself one of the mysteries.

<sup>24</sup> *De nupt. et conc.* I.23, CSEL 42, p. 236.

<sup>25</sup> See *Vetus Latina* 24.1 (1962–64), pp. 258–62.

<sup>26</sup> See Tertullian, *De anima* 11.4, CCL 2, p. 797: "nam etsi Adam statim prophetavit magnum illud sacramentum in Christum et Ecclesiam: Hoc nunc [etc., Gen. 2:23–24]. . . ." See also *De anima* 21.1 (CCL 2, p. 813); *De ieiunio* 3.2 (*ibid.*, p. 1259); and *De exhortatione castitatis* 5.3 (*ibid.*, pp. 1022–23). See Waszink's note in Tertullian, *De anima*, ed. Waszink (Amsterdam, 1947), p. 198.

<sup>27</sup> E.g. Ambrose, *Expositio evangelii Lucae* VII.9, CSEL 32.4, p. 395.

The version found both in the writings of Augustine and in the Vulgate is as follows: "Sacramentum hoc magnum est ego autem dico in Christo et in Ecclesia." This reading, with its *in*-plus-ablative construction, apparently means: "Now this sacrament is great, I say, in Christ and in the Church." It may have given rise to Augustine's notion that the sacrament is great inasmuch as it is "in" (that is, inasmuch as it exists between) Christ and the Church. It may also have suggested to him that the indissolubility of marriage (and thus the *sacramentum*) was observed only *in the Church*.

Augustine was deeply influenced by a mode of discourse that the fifth chapter of Ephesians had generated in the writings of his predecessors. Here marriage or the marriage bond is assimilated to its exemplar, the union between Christ and the Church, while the word *sacramentum* is used to denote Adam's prophecy or the mystery it annunciates. For example, Tertullian argues that by interpreting the dictum "they will be two in one flesh" as a reference to the spiritual marriage between the Church and Christ, St Paul showed that the law of monogamy (*monogamia* or *unum matrimonium*) was observed both in the foundation (*fundamentum*) of human kind and in the *sacramentum* of Christ.<sup>28</sup> The word *sacramentum* is here synonymous with *mysterium*.

A passage from the commentary on Luke's gospel by Ambrose contains perhaps the closest precedent. Ambrose maintains that marriage is not indissoluble unless it has been joined by God: that is to say, unless both partners are baptized Christians. This leads him to compare marriage with the union between Christ and the Church:

... "every man who dismisses his wife and marries another commits adultery" [Luke 16:18]. The Apostle rightly teaches that "this is a great sacrament regarding [*de*] Christ and the Church." Here is a marriage that no-one doubts has been joined by God, since he himself says, "no-one comes to me unless the Father, who sent me, has drawn him" [John 6:44]. For he alone is able to join together this marriage. Thus Solomon says mystically [i.e., according to the spiritual sense]: "the wife will be prepared for her husband by God" [Prov. 19:14]. Christ is the husband and the Church is his wife—a wife in charity, a virgin in her wholeness.<sup>29</sup>

<sup>28</sup> *De exhortatione castitatis* 5.3–4, ed. Moreschini, SC 319, p. 88.

<sup>29</sup> *Expositio evangelii Lucae* VIII.9, CSEL 32.4, p. 395.

It would be difficult to extract an argument from this text. Perhaps one should regard it as a constellation of ideas. Be this as it may, two curious features should be noted. First, Ambrose crosses over entirely from temporal marriage into the mystical marriage. We shall consider passages in which Augustine makes the same move, maintaining, for example, that there is no divorce in the marriage between Christ and the Church. Second, Ambrose writes as if Paul was referring to Jesus' prohibition of divorce when he said "this is a great sacrament." His reason for doing so is that both Jesus' prohibition and Ephesians 5:32 are predicated on the same text, namely Genesis 2:24, but by reading indissolubility into the fifth chapter of Ephesians, Ambrose loses sight of the focus of the text, which is marital charity and the union in one flesh. Augustine confirms this manner of understanding how marriage contains a sacrament of Christ and the Church. Much (though not all) of the theology of marriage in the Latin tradition after Augustine is focused almost exclusively on indissolubility and is only marginally concerned with conjugal charity and the relationship of husband and wife.

Augustine's understanding of what constituted the benefit of sacrament came not so much from Ephesians as from Jesus' treatment of divorce and remarriage in the synoptic gospels. Jesus said that remarriage after divorce was adultery, and Augustine deduced from this that there was an indissoluble marriage bond. It seemed to him that this bond was analogous to the "sacrament of faith" conferred through baptism. He also recognized that there was some close relationship or analogy between marriage and Christ's union with the Church. Augustine's notion of the benefit of sacrament expresses a three-fold comparison. One may liken the pattern of his reflections to an upright isosceles triangle. At the apex of the triangle is the union between Christ and the Church; at the lower left corner is the union between husband and wife; and at the lower right corner is the union between the individual Christian and the Church. By virtue of the last union, which is conferred in baptism, a person becomes a member of the body of Christ, for Christ is the head of the Church. These comparisons should now be considered in more detail.

*Marriage and Christ's union with the Church*

Augustine sometimes not only likens Christ's union with the Church to a marriage but regards it as a marriage, and even

as the marriage *par excellence*. This is apparent in a passage in his treatise on John's gospel, where Augustine considers the significance of the wedding at Cana. Having argued that marriage is made by God (and divorce by the devil), Augustine adds that even those who have vowed virginity are not "without marriage" because the very Church in which they stand superior to married folk is itself the bride of Christ:

Nor are they without marriage who have vowed virginity to God, although they hold a superior degree of honour and sanctity in the Church [to married folk]. For they also pertain to marriage along with the whole Church, and in this marriage Christ is the bridegroom.<sup>30</sup>

It is as if each Christian marriage participates in the great marriage of the Church to Christ. In a passage in the *De nuptiis et concupiscentia* that we have noted above, Augustine suggests that between Christ and the Church on the one hand and between husband and wife on the other there is the same *sacramentum*, great in the former case and little in the latter. The text is in effect a gloss on Ephesians 5:31–33, which turns from the great sacrament *in* Christ and the Church to the marriages of individual couples within the Church:

[31] "For this reason a man will leave his father and mother and be joined to his wife and they will be two in one flesh."  
[32] Now this sacrament is great, I say, in Christ and in the Church. [33] However, as for each one of you, let each one [*et vos singuli, unusquisque*] love his wife as himself, and let the wife respect her husband.

In what might be regarded as Augustine's gloss, the *bonum sacramenti*, as the third of the benefits of marriage, speaks for itself as follows:

... of me it was said in Paradise before sin [entered into the world]: "A man will leave his father and mother and be joined to his wife and they will be two in one flesh," which the Apostle says is a "great sacrament in Christ and in the Church." Therefore what is great in Christ and in the Church is very small in individual husbands and wives [*in singulis quibusque viris atque uxoribus*], but is nevertheless a sacrament of an inseparable union.<sup>31</sup>

Because of Augustine's received version of Ephesians 5:32, his affirmation that marriage is indissoluble in the Church is

<sup>30</sup> *Tract. in Ioh.* 9.2, CCL 36, p. 91.

<sup>31</sup> *De nupt. et conc.* 1.23, CSEL 42, p. 236.



curiously ambiguous: it can mean either that the marriage of Christians is indissoluble or that the marriage of Christ and the Church is indissoluble. Ambiguities of this kind are inherent in Augustine's way of expounding the sacrament. He sometimes seems to merge the two meanings, assimilating one to the other, as in the following passage:

For this is what is preserved "in Christ and the Church": that they [i.e. Christ and the Church] should live together for eternity with no divorce. The observance of this sacrament is so great "in the city of our God, in his holy mountain"—that is, in the Church of Christ and in each and every married believer, for they are without doubt Christ's members—that even when women marry or men take wives "for the sake of procreating children," a man is not allowed to put away a barren wife in order to take another, fruitful one.<sup>32</sup>

### *Marriage and baptism*

That some comparison should be made between marriage and baptism is not surprising. In retrospect the comparison seems inevitable, although, as far as I am aware, Augustine was the first to make any significant use of it. The author of Ephesians implicitly compares marriage with baptism by saying that Christ loved the Church and gave himself up for her "that he might sanctify her, having cleansed her by the laver of water with the word" (Eph. 5:26). The word for laver—*loutron* in Greek and *lavacrum* in Latin—occurs elsewhere in the New Testament only in Titus 3:5, where it obviously refers to baptism. (In the complex imagery of Ephesians it also refers to the bathing of the bride before her wedding in the traditions of Greece and the Middle East.) The images of corporeal identity and incorporation that run through Ephesians 5:23 ff. cannot but suggest analogies between becoming married and becoming a member of the Church, which is Christ's body. The point at which the parallel between baptism and marriage becomes striking to Augustine pertains to indissolubility.

As we have noted, the crux of Augustine's theory of the sacrament in marriage is the premise that the marriage of Christians cannot be dissolved. He derives this premise from Jesus' rejection of divorce in the synoptic gospels. What most impresses Augustine about these texts is the assertion that someone who divorces and remarries commits adultery. Insofar

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<sup>32</sup> *Ibid.*, I.11, p. 223.

as this is the case, he reasons, the person in question must remain in some way married to the original partner. Augustine perceived an analogy between the fact that marriage survives the breakdown of the marital fellowship or *societas* and the fact that the indelible consecration effected in baptism survives apostasy and even excommunication. Following some developments that took place in the twelfth century, theologians have used the word "character" to denote this indelible condition, but Augustine called it variously *consecratio*, *sacramentum fidei* or simply *sacramentum*. (The word "character," in his usage, has a different significance.<sup>33</sup>) He regards the consecration or "sacrament of faith" that is conferred in baptism more as a form of membership than as a seal or brand placed upon the soul.

Whereas in the *De bono coniugale* Augustine simply affirms that divorce does not dissolve the marriage bond or the marital compact,<sup>34</sup> in the *De nuptiis et concupiscentia* he posits a residual element that he calls "some conjugal thing" (*quiddam coniugale*). Clearly, a person who has divorced and remarried is in an ordinary and real sense no longer married to his original partner, just as the apostate is no longer a member of Christ's body. Their divorce is real at least inasmuch as they have gone separate ways (for the word *divortium* comes from *divertere*: "to go different ways," "to turn aside"). Moreover, if the divorce is valid in civil law, it will have civil consequences, and Augustine is in no position to deny these. Whereas the enduring conjugal element used to unite the spouse to his or her partner in a fellowship, it remains after the putative remarriage as a source of guilt and damnation:

Thus there remains between the partners as long as they live some conjugal thing [*quiddam coniugale*] that neither separation nor remarriage can remove. It remains, however, as a source of guilt, and not as the bond of covenant [*vinculum foederis*].<sup>35</sup>

Augustine's reasoning depends upon an analogy (and it is no more than an analogy) between this marital residue, the en-

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<sup>33</sup> See N. M. Haring, "St Augustine's use of the word *character*," *Mediaeval Studies* 14 (1952), 79-97.

<sup>34</sup> *De bono coni.* 17, CSEL 41, p. 209, line 20 (*vinculum nuptiarum*); 32, p. 227, line 6 (*vinculum nuptiale*); 7, p. 197, line 13 (*confoederatio nuptialis*).

<sup>35</sup> *De nupt. et conc.* I.11, CSEL 42, p. 223. See also *De bono coni.* 6-7 (pp. 196-97), 17 (p. 209) and 32 (pp. 226-27); and *De adulterinis coniugiis* II.4, CSEL 41, p. 386.

during *quiddam coniugale*, and the enduring *sacramentum fidei* that is conferred in baptism. He continues:

In like manner, when the soul of an apostate withdraws, as it were, from her marriage with Christ, faith [*fides*] is destroyed but she does not lose the sacrament of faith [*sacramentum fidei*] that she received in the laver of regeneration. For what she has lost by departing will without doubt be given back to her if she returns. But in one who withdraws [from the faith], the possession of this [sacrament] works for the increase of punishment rather than for the meriting of reward.<sup>36</sup>

It is perhaps not coincidental that Augustine arrived at the theory of the *bonum sacramenti* while he was engaged in the Donatist controversy, for it was in the course of this controversy that he developed his theory of the enduring *sacramentum* in baptism and ordination.<sup>37</sup>

Inasmuch as infidel marriage is dissoluble, it does not contain the benefit of sacrament. Augustine says in the *De bono coniugali* that:

once marriage has been entered into "in the city of our God," where even from the first joining of two persons there is in marriage a certain sacrament [*quoddam sacramentum*], it can in no way be dissolved except by the death of one of them.<sup>38</sup>

Augustine's explanation of this uniqueness in the *De bono coniugali*, which contains his first adumbration of the theory of the three benefits, is different from that in the later treatise *De nuptiis et concupiscentia*. In the earlier work Augustine affirms that the benefits of progeny and fidelity exist among all peoples while the "sanctity of sacrament" exists only in the Church:

Therefore the good of marriage among all peoples and everyone consists in the aim of procreation and the faith of chastity. But among the people of God the good consists also in the sanctity of sacrament, by virtue of which it is unlawful for a woman who leaves her husband, even by repudiation, to marry another as long as her husband lives. . . .<sup>39</sup>

It is apparent from his preceding treatment of the benefits of progeny and fidelity, however, that Augustine attributes to these

<sup>36</sup> *De nupt. et conc.* I.11, pp. 223–24.

<sup>37</sup> See N. M. Haring, "St Augustine's use of the world *character*," *Mediaeval Studies* 14 (1952), 79–97. Augustine compares the indissoluble bond in marriage to the indissoluble *sacramentum* of ordination in *De bono coniugali* 32, CSEL 41, p. 227.

<sup>38</sup> *De bono coni.* 17, CSEL 41, p. 209.

<sup>39</sup> *De bono coni.* 32, pp. 226–27.

benefits a special function in the Christian context, a function that he would not expect them to have outside the Church. This idea becomes explicit in the *De nuptiis et concupiscentia*, where Augustine again affirms that the benefits of fidelity and progeny are observed everywhere, even among pagans, but he emphasizes that these benefits are observed in a special way in the Church. The infidels fear adultery and desire progeny, but the Christian is more concerned with his own fidelity than with that of his spouse, for he is more concerned with his own merits before Christ than with the injuries done to him by his partner. Again, the Christian is more concerned with the spiritual rebirth of his children than with their physical birth. As for the *sacramentum*: Christians should observe this with honour and chastity.<sup>40</sup>

In the *De adulterinis coniugiis*, which he composed around AD 419 (and which was therefore contemporaneous with the *De nuptiis*), Augustine takes a further step by maintaining that the bond (*vinculum*) remains even after a valid divorce on the ground of fornication. Once again, Augustine finds a parallel in baptism, for just as the sacrament of regeneration conferred in baptism remains even after excommunication, so the sacrament constituted by the marriage bond survives even valid divorce:

Just as the sacrament of regeneration remains in someone who has been excommunicated for a crime, and is always with him even if he is never reconciled with God, so also the bond of the marital compact remains in a wife who has been divorced on the ground of fornication, and is always with her even if she is never reconciled with her husband. . . .<sup>41</sup>

It becomes clear, from this point of view, why it is better to say that some marital thing or some bond remains than to say simply that the couple are still married. For in the case of a valid divorce, not only do husband and wife separate, but the mutual obligations that bound them are dissolved. Their *societas* or fellowship has ceased not only *de facto* but also *de iure*. Nevertheless, Augustine maintains, something remains between the spouses that binds them together.

In order to subject Augustine's conception of the sacrament in marriage to closer scrutiny, one may distinguish between two aspects of the sacrament and consider each in turn. The first aspect is the constitution of the thing itself, and the second

<sup>40</sup> *De nupt. et conc.* I.19, CSEL 42, pp. 231–32.

<sup>41</sup> *De adulterinis coniugiis* II.4, CSEL 41, p. 386.

is the relation between this thing and the union between Christ and the Church. In other words, the sacrament should be considered (as Augustine might say) first as *res* and then as *signum*. Since the existence of the sacrament is manifest chiefly in indissolubility, we need first to consider the nature of the marriage bond.

*The nature of the bond*

Why can a husband not marry another woman as long as his wife is alive? As we have seen, Augustine provides two answers to this question: first, it is against the divine law; second, the spouses are bound by an indissoluble bond. Can one of these premises be reduced to the other?

Augustine posits a bond because Jesus, rather than simply prohibiting remarriage after divorce, declares that remarriage is adultery. This thesis suggests that divorcees are in some way still married. Furthermore, it suggests that remarriage is strictly not so much illicit or forbidden as impossible. It is in reality not something one *ought* not to do; rather, it is something one cannot do and ought not to pretend to do. Augustine's thesis takes the form of a causal explanation: the continued existence of the bond makes remarriage adultery.

Augustine introduces notions such as that of the bond and of the residual *quiddam coniugale* because something of the marriage seems to survive the cessation of the existential relationship: that is, the relationship constituted by social and psychological conditions, the "social fact." Even though the spouses no longer regard each other as man and wife, and even if they have ceased to cohabit and have remarried, they are really still married to one another. Is the bond simply a function of what the *lex divina* forbids, or is it what has sometimes been called an ontological or metaphysical bond? In other words, is it something (in this respect like fatherhood) that exists as a fact but has consequences regarding rights, obligations and so on? Or is the *quiddam coniugale* nothing more than a legal impediment to remarriage (that is, in effect, a law forbidding a man and a woman who have entered into a compact of marriage to marry again as long as both are alive)? If the second opinion is the one Augustine holds, perhaps this is why he writes that a Christian man is able (*possit*) to dismiss a sterile wife and remarry, but is not permitted (*licet*) to do so.<sup>42</sup>

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<sup>42</sup> *De bono coni.* 7, CSEL 41, pp. 196–97.

Augustine did not raise such questions or make such distinctions in his own treatment of marriage, but the pattern of his thinking in this matter seems to have been as follows. He was convinced that remarriage after divorce was against the divine law. There were in addition aspects of his conception of the sacrament that he does not define or fully explain. For example, he does not state exactly what is the precise nature of the relation between marriage and Christ's union with the Church. Moreover, Augustine preferred to explain the indissolubility of marriage in concrete and metaphorical terms. He offered no definition of the bond or the *quiddam coniugale*. He does not tell us what these things *are*, only what they *do*.

In some passages, therefore, Augustine considers the sacrament to be constituted by rights and obligations and by what the law permits and forbids. What he calls the *res* of the sacrament—that is, the sacrament as a thing rather than as a sign—consists in a compact (*nuptiale foedus*). In the *De nuptiis et concupiscentia*, Augustine attempts to explicate this compact by defining the obligations that constitute it:

The *res* of the sacrament is undoubtedly this: that a man and a woman who are joined in marriage should persevere inseparably as long as they live, and that one spouse cannot be parted from the other except on the ground of fornication.<sup>43</sup>

From this point of view, the bond ought to be reducible to certain rights and obligations, but it cannot be reduced to obligations existing between the spouses if the bond survives valid divorce and the suspension of all conjugal obligations and duties. One might argue that a bond of fidelity remains inasmuch as the possibility of reconciliation must be left open. This was the position of Hermas.<sup>44</sup> But Augustine does not argue on these grounds. To be sure, he maintains that reconciliation is permissible and desirable, and believes that the endurance of this possibility is one of the virtues of the position he maintains,<sup>45</sup> but he does not attempt to derive the survival of the bond from the need to leave a door open for reconciliation. The permanence of the bond must simply be accepted as a revealed but unexplained fact.

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<sup>43</sup> *De nupt. et conc.* I.11, CSEL 42, pp. 222–23. Cf. *De bono coni.* 6, CSEL 41, p. 196: “Usque adeo foedus illud initum nuptiale cuiusdam sacramenti res est, ut nec ipsa separatione inritum fiat. . . .”

<sup>44</sup> Hermas, *Pastor*, Mand. IV.1(29). 5–8, ed. M. Whittaker, GCS, pp. 25–26.

<sup>45</sup> See for example *De adulterinis coniugiis* II.5 (CSEL 41, p. 387) and ff.

Augustine's convictions about indissolubility prevented him from reducing the marriage bond to acquired rights and obligations. Contrariwise, it was because of his refusal to admit that there could be any exceptions or concessions to the law regarding divorce and remarriage that Augustine explained the permanence of marriage in concrete and metaphorical terms.

Augustine tended to mystify the marital relationship by reifying it as a *vinculum* and then evacuating the *vinculum* of any comprehensible substance. Something binds the spouses together, and causes remarriage to be adultery even after a valid divorce; but we cannot say what binds them together. This is a way of talking about marriage that proved to be well-adapted to a dogmatic and inflexible treatment of the question of remarriage after divorce. Paradoxically, the usage gives the impression that an appeal is being made to objective, definitive and incontrovertible principles even though it is clear to no-one what these principles are. The notion of the marriage bond served the same end as the notion that Jesus, speaking as legislator of the *lex divina*, had absolutely prohibited remarriage. One defect of this way of understanding marriage is that it tends to the absurd idea that the bond that is the essence of marriage is manifest chiefly in the impossibility of remarriage. What is needed, and what Jesus himself outlines in the gospels, is a positive account of marriage as a relationship between the spouses that entails in consequence that the spouses should not divorce and remarry. In other words, it must be because of what they owe to each other that neither is entitled to give him- or herself to a third party. Augustine, who (despite the *De bono coniugali*) did not think highly of marriage, was content to regard marriage above all as a loss of individual freedom and a form of sacrifice. All Christians should be prepared to bear their crosses.

*The relation between marriage and Christ's union with the Church*

The very use of the word *sacramentum* suggests that marriage is a "sacred sign," a visible representation of some invisible and sacred reality. Moreover, the appeal made to Genesis 2:24 in Ephesians 5:32, where the "great sacrament" was first announced, suggests that marriage might be regarded as a prophetic type or figure. Augustine regards marriage as a type when he argues that the *sacramentum* in the polygamous marriage of the Patriarchs signified the multitude that in our own time would come into the Church and become subject together

to God, while the *sacramentum* of the monogamous marriage of the new dispensation signifies the unity of the world to come, when all the elect will be as one, being subject to God in the heavenly city.<sup>46</sup> (Here indissolubility does not appear to be the essential constituent of sacramentality.) An obscure remark of Tertullian regarding the polygamy of the Patriarchs implies the same idea. May we not follow their example? Yes, Tertullian answers, "if there still exist certain types of a future mystery [*sacramentum*] that your marriage prefigures."<sup>47</sup> The implication seems to be that polygamy in the Old Testament period prefigured something that was realized with Christ. The figures or signs should cease now that the reality has come. In Augustine's view, however, marriage is more than a prophetic figure of the mystical union. Moreover, marriage does more than signify the mystical union, if by "signify" one means the kind of relation that obtains, for example, between a crucifix and the Cross of Christ. It emulates and in some way embodies this union.

As we have seen, Augustine appeals to the comparison between marriage and Christ's union with the Church when he discusses indissolubility. For example, he argues that marriage endures until death in the case of human marriage even as it endures forever in the great marriage, where there is no death.<sup>48</sup> It is difficult to determine the purpose of this kind of comparison. Is Augustine arguing from the premise that the two unions are closely analogous to the conclusion that marriage is indissoluble?<sup>49</sup> Is he reflecting upon the meaning or significance of indissolubility, having already established that marriage is indissoluble? The second suggestion is probably nearer

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<sup>46</sup> *De bono coni.* 21, pp. 214–15.

<sup>47</sup> *De exhortatione castitatis* 6.1, ed. Moersch, SC 319, p. 88: "Sane licebit, si qui adhuc typi alicuius futuri sacramenti supersunt, quod nuptiae tuae figurent. . . ."

<sup>48</sup> Cf. *De nupt. et conc.* I.11, p. 223: "Hoc enim custoditur in Christo et ecclesia, ut vivens [Christus] cum vivente [ecclesia] in aeternum nullo divortio separetur. . . . Ita manet inter viventes [virum et uxorem] quiddam coniugale. . . ."

<sup>49</sup> I doubt if this argument is cogent. First, similar things do not need to be similar in every respect (as Aquinas points out in *IV Sent.* 44.1.1, *quaestiuncula* 1, ad 1m). Second, it begs the question of whether a marriage that signally fails to symbolize the union between Christ and the Church in other salient respects (for example, because of implacable hatred) must nevertheless symbolize the union in this respect. Third, the most that could follow from the argument is that a marriage which is dissolved does not symbolize the union, and not that marriage is indissoluble.



the truth. Augustine believes (I shall argue) that God made marriage indissoluble so that it might symbolize the union between Christ and the Church. He also aims to make indissolubility meaningful by setting it within a particular theological and ideological context. He asks his readers to think of marriage in terms of the mystical marriage in which all Christians participate and which is the archetype of Christian marriage. The aim is to inculcate a Christ-centred ideology, so that one's conception of marriage is shaped by its exemplar, the mystical union, and so that the aspirations of Christians with regard to marriage are caught up into the essential aspiration of their religion: namely, the faith, hope and charity by which the members of the Church acknowledge that they are collectively united to Christ, and united through the humanity of Christ to God. He may have intended the comparison to corroborate the doctrine of indissolubility, but the latter depends chiefly not on the theory of the sacrament but on Christ's prohibition of divorce in the synoptic gospels.

The manner in which Augustine assimilates marriage to the union between Christ and the Church is exemplified in a statement we have already considered: "what is great 'in Christ and in the Church' is very small in individual husbands and wives, but is nevertheless a sacrament of an inseparable union."<sup>50</sup> The sense of this convoluted and highly rhetorical statement depends upon the complex and equivocal meaning of the word *sacramentum*. Augustine obscures the relation between the two sacraments, so that we are momentarily prevented from seeing that they are distinct. The point is that the little sacrament (i.e., the marriage bond) is a sacrament of the great sacrament (i.e., the mystery of the inseparable union between Christ and the Church). Indissolubility is the salient feature of the comparison and the point of assimilation, although there is little in the fifth chapter of Ephesians to suggest this.

In another revealing passage, Augustine appeals to the sacramental relation as the *raison d'être* of the indissoluble bond:

But if this [i.e. divorce and remarriage] is not permitted, as the divine rule is seen to prescribe, is one not caused to ask what is meant by this degree of firmness in the conjugal bond? I think that it could not have been so strong were it not that from this weak and mortal condition of mankind a certain sacrament of some greater reality [*alicuius rei maioris . . . quoddam sacramentum*]

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<sup>50</sup> *De nupt. et conc.* I.23, p. 236.

has been taken, so that when people desert it and seek to dissolve it, it remains steadfast and works to their punishment. For the nuptial compact [*confoederatio nuptialis*] is not dissolved when a divorce occurs, and thus even separated persons remain married to each other and commit adultery with those whom they have [re]married. . . .<sup>51</sup>

I think that Augustine is here saying that God made marriage indissoluble so that it might take on this special significance. The word *sacramentum* in the above passage seems to mean "sacred sign," although in an elevated sense pertaining to emulation. If this is true, then the *res* to which Augustine refers must be the sacrament's signified: namely, Christ's marriage with the Church. Moreover, Augustine is seeking the reason for a divine rule: namely, the prohibition against divorce and remarriage. The argument is that God has prohibited the dissolution of marriage so that marriage may serve as a sign of Christ's union with the Church. I admit that Augustine does not state this explicitly, and in any case the qualification entailed by the word *quoddam* (there is a "kind of sacrament") indicates that he is not quite sure what he is positing. Part of what he wishes to affirm is that something analogous to the *sacramentum fidei* of baptism remains between spouses despite divorce and remarriage.

It should also be noted that according to this passage, marriage would not be indissoluble were it not that "from this weak and mortal condition of mankind a certain sacrament of some greater reality has been taken." This is a characteristically Augustinian reflection. As in his epistemology, Augustine looks above and beyond this changing world for an explanation whenever he comes across something permanent. Whereas human laws may change, the divine law is eternal. That the prohibition of remarriage is absolute cannot but indicate that marriage is sacred. Augustine is well aware that there may be good human reasons for divorce and remarriage, but in his view such reasons can never be sufficient. They fall away in the face of an absolute and God-given precept.

Although indissolubility is at the centre of Augustine's conception of the sacrament, he associated other attributes of marriage with its sacramentality. He clearly believed that the sacrament was closely related in some way to the fact that marriage was not an essentially carnal relation and to the pos-

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<sup>51</sup> *De bono coni.* 7, p. 197.

sibility of transforming marriage into something entirely spiritual and charitable. This aspect of his thought is far from clear, but it was very important to him, and it deserves careful examination here.

*The sacrament and spiritual union*

Augustine does not explicitly assign any use to the sacrament in marriage, not even one that pertains to the pastoral needs of Christians. When he explains how marriage provides a remedy against concupiscence, he does so in terms of the benefits of fidelity and progeny, and not of sacrament. Contrariwise, when he considers the problems that sexual desire might arouse for a man who has validly divorced his wife on the ground of fornication but may not remarry, his response amounts to saying that we must do what Christ has commanded because Christ has commanded it. He regards such problems as irrelevant to the question of indissolubility. The meaning of Scripture, he protests, cannot be twisted for the sake of those who find self-control burdensome. The incontinent must follow the law of Christ, and the latter cannot be adapted to the needs of the former.<sup>52</sup>

If the benefit of sacrament were to be explained in terms of some utility, the thesis of absolute indissolubility would be untenable. There must be *some* circumstances in which divorce and remarriage would be justified at least on pastoral grounds. Nevertheless, Augustine does consider that the existence of the sacrament implies or entails something pertaining to the proper regard that the spouses should have toward one another; in other words, to the spiritual union. Moreover, his treatments of the sacrament and of spiritual union respectively are parallel inasmuch as both involve distinguishing between carnal and non-carnal aspects of marriage.

From among the many prudential and utilitarian reasons that might be proposed for divorce and remarriage, Augustine invariably mentions just one: sterility. Whenever he discusses the benefit of sacrament in marriage, he points out that a marriage must endure even when there is no issue, and that remarriage is not justified even for the sake of progeny.<sup>53</sup> The Romans traditionally supposed that marriage was a state one

<sup>52</sup> *De adulterinis coniugiis* II.9, CSEL 41, p. 393.

<sup>53</sup> *De bono coni.* 7, CSEL 41, pp. 196–97; 17, pp. 209–10; 32, p. 227. *De Gen. ad. litt.* IX.9, CSEL 28.1, p. 276. *De nupt. et conc.* I.11, CSEL 42, p. 223; I.19, p. 231.

entered into *liberorum procreandorum causa* (that is, for the sake of procreating children). Variants of this phrase appeared in the nuptial documents (*tabulae nuptiales*) that recorded the fact that a marriage had taken place and to what financial terms the parties had agreed.<sup>54</sup> Augustine himself declares that God instituted marriage for the sake of procreation.<sup>55</sup> Nevertheless, a Christian man whose wife is barren cannot divorce and remarry for the sake of progeny. It is this fact, according to Augustine, that most distinguishes Christian marriage and that reveals the existence of the sacrament. In the *De nuptiis et concupiscentia*, apparently forgetting momentarily the benefit of fidelity, he says that sacrament "is the only benefit that even a barren marriage possesses, and this by right of piety [*ius pietatis*], since the hope of fecundity, because of which the couple were joined in marriage, has been lost."<sup>56</sup>

Why does Augustine focus on the case of sterility as the point of contrast between divine and human law? As we have noted, it is probable that the emperor Julian removed Constantine's restrictions upon divorce, and that these were not imposed again until AD 421. If this thesis is correct, Augustine developed his theory of marriage during a lax period in which one could divorce for any reason whatsoever or for no reason at all. In any case, neither Constantine's constitution of AD 331 (*Cod. Theod.* 3.16.1) nor any other extant law includes sterility among the valid grounds for divorce, but it may well have been a customary reason. The historian Valerius Maximus tells us that in the very first case of divorce in Rome the marriage was dissolved because of sterility. He adds that while most considered this to be a sufficient reason, there were those who considered the divorce to be reprehensible, judging that the desire for offspring should not be set above marital fidelity.<sup>57</sup> (The ideals that Augustine regarded as peculiarly Christian were not unknown among the pagans.) Sterility may have failed to have appeared among the grounds for divorce because in such cases there would usually be a divorce *bona gratia* (what-

<sup>54</sup> See Augustine, *Contra Faustum* XV.7, CSEL 25.1, p. 429: "ducunt enim eas ex lege matrimonii tabulis proclamantibus liberorum procreandorum causa. . . ." Cf. *CJ* 5.4.9.

<sup>55</sup> *De adulterinis coniugiis* II.12, CSEL 41, p. 395. *Contra duas epistulas Pelagianorum* I.10, CSEL 60, p. 431: "... dicimus a deo nuptias institutas propter ordinatam generationem filiorum. . . ."

<sup>56</sup> *De nupt. et conc.* I.19, p. 231.

<sup>57</sup> Val. Max. II.1.4.

ever that may mean). Be this as it may, the explanation for Augustine's focusing upon sterility cannot be that he was opposing some well known principle of civil law.

Augustine may have considered that the desire to generate progeny was characteristic of the preoccupations of non-Christians, who do not realize that time is short. But I suggest that he focused on sterility as the chief ground for divorce because this allowed him to differentiate between the natural and supernatural aspects of marriage; or, as it might be said, between marriage in the natural law and in the positive divine law. Augustine had come around to the opinion that God made marriage for the sake of procreation,<sup>58</sup> and the theory of the sacrament in marriage grew up alongside his recognition that sexual procreation is part of the natural order of things.

From one point of view, the intention to generate one's own children is what distinguishes marriage from mere concubinage. Augustine says that he learned from his own experience with his concubine what differentiates marriage from concubinage. One contracts the former for the sake of generating children, while the latter is merely a pact made to satisfy sexual desire (*pactum libidinosi amoris*). In the latter case, he explains, children are born contrary to one's intention, although when they have been born they may force one to love them (as Augustine loved his natural son, Adeodatus).<sup>59</sup>

Likewise, Roman law regarded the intention to generate and raise legitimate children (Augustine's *bonum prolis*) as one of characteristics of marriage. The emperor Probus ruled in a rescript to a man called Fortunatus that, although no *tabulae nuptiales* had been drawn up, these were not essential to establish that he was married, and that the marriage was valid "if you have had a wife in your home for the sake of begetting children [*liberorum procreandorum causa*], and your neighbours or others knew this."<sup>60</sup> The phrase "for the sake of begetting children" would have been inscribed on the nuptial documents if there had been any.

Augustine's treatment of the spiritual relationship and of the sacrament are parallel to one another in this respect. He introduces the former when he argues that coitus is not a

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<sup>58</sup> *De adulterinis coniugiis* II.12, CSEL 41, p. 395. *Contra duas epistulas Pelagianorum* I.10, CSEL 60, p. 431.

<sup>59</sup> *Conf.* IV.2(2), CCL 27, pp. 40–41.

<sup>60</sup> *CJ* 5.4.9.

necessary condition for marriage. He deduces the existence of the latter from the fact that one cannot divorce and remarry even for the sake of procreation. In both cases he invokes the appropriate principle to show why marriage endures despite the absence of something that normally pertains to marriage, and in both cases Augustine distinguishes between two aspects of marriage, one of which is carnal and the other spiritual. The spiritual aspect is essential while the carnal one (coitus or procreation) is not.

There is no doubt that Augustine closely associates one thesis with the other. In the *De nuptiis et concupiscentia*, for example, having explained that there must be a sacrament in marriage because a *quiddam coniugale* remains between those who separate and remarry, Augustine adds that the bond (*vinculum*) is not dissolved when husband and wife abstain by mutual agreement from sexual intercourse. On the contrary, the bond is firmer because they are tied not by carnal pleasure but by the affections of their rational will. This leads to a discussion of the marriage of Mary and Joseph.<sup>61</sup> The same association is evident when Augustine responds to Julian's criticisms of this passage in the *Contra Iulianum*. Julian had argued that "because sexual intercourse was lacking" between Mary and Joseph, "there was in no sense a marriage." Augustine responds with his customary argument about elderly spouses, who do not need to keep having sex in order to remain married, and from this he turns immediately and by way of further explanation to the benefit of sacrament:

I, however . . . , besides the fidelity that spouses owe to one another, lest they commit adultery, and progeny, for the sake of generating which the sexes engage in intercourse, have also drawn attention to a third benefit that ought to exist in the spouses, especially in those belonging to the people of God. . . .<sup>62</sup>

Although Augustine closely associated the sacrament and the spiritual relationship, that they cannot be one and the same. The sacrament accounts for the absolute indissolubility of marriage, and in the normal course of events it is precisely when companionship is no longer possible that Christian spouses come up against the indissoluble bond. They may find, as certain medieval charters for divorce by mutual consent have it, that

<sup>61</sup> *De nupt. et conc.* I.11-12, *CSEL* 42, pp. 222-25.

<sup>62</sup> *Contra Iulianum* V.12(46), *PL* 44:810.

there is no longer any Godly charity between them and that cohabitation is no longer tolerable,<sup>63</sup> but because of the sacrament, their marriage cannot be dissolved. Nor can the sacrament be identified with an obligation to persevere in the spiritual relationship, for it is because of the sacrament that one cannot remarry even after a valid divorce on the ground of adultery.

Augustine's thesis regarding the spiritual relationship in marriage, therefore, is not apt to account for indissolubility. On the contrary, if it is "conjugal charity" that makes marriage, there ought to be no marriage when there has been a valid divorce after adultery, and even when husband and wife are no longer well-disposed toward each other. Again, if the bond is firmer when the couple are linked by the affections of their rational will, we might expect that it would be dissoluble when there is no marital affection between them. Augustine's spiritual relationship is closely related to the *affectio maritalis* of Roman law, where marriage is notoriously dissoluble. The sacrament pertains to an aspect of marriage that begins to exist when the partners marry and remains unalterable thereafter. The spiritual relationship, on the contrary, pertains to something that may or may not obtain in an existing marriage, and that, as Augustine himself emphasizes, can flourish as the partners grow older. Augustine's problem, as I see it, is that he is conflating an existential bond (a relationship, in other words) with the indissoluble bond (whatever that may be). The premise that it is conjugal charity that makes marriage ought to entail that marriage is dissoluble.

The logical conclusion of this kind of consensualism is drawn by the author of the *Opus imperfectum in Matthaeum*, an Arian of the mid fifth century, commenting on Matthew 19:9. He argues that because it is intent or will, and not coitus, that makes marriage, a man who dismisses his wife and remains unmarried does not dissolve his marriage to her, while a man who dismisses his wife and remarries does dissolve their marriage:

Every thing is dissolved through the same causes that brought it into existence. Now it is not coitus that makes marriage, but intent [*matrimonium enim non facit coitus, sed voluntas*]. It is not separation of the body that dissolves marriage, therefore, but separation of intent. Therefore he who divorces his wife and does not marry another is still her husband, for even if he is

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<sup>63</sup> See the following in *MGH Form.*: Marc. II.30 (P. 94); Tur. 19 (pp. 145–46); Merk. 18 (p. 248); Sen. 47 (p. 206).

now separated from her in body, he is nevertheless still joined to her in intent. And therefore it is when he marries another woman that he divorces her fully, and it is not he who dismisses his wife who commits adultery, but he who marries another.<sup>64</sup>

The argument, while obscure in part, is remarkably similar to that of Ulpian in *Dig.* 24.1.32.13. According to Ulpian, if a woman and her husband have lived apart for some time but have continued to regard each other with marital honour, they are still married, for "it is not coitus that makes marriage, but marital affection."

The point I am making can be summed up in the following way. The theory of the sacrament in marriage springs from the belief that marriage is an indissoluble compact. Once it has been formed, no one can dissolve it. The theory of the spiritual union, on the contrary, treats marriage as a continuing, existential relationship. Consider the argument that elderly spouses who no longer engage in sexual intercourse remain married. Augustine could have argued that the invisible bond or the sacrament remains whatever the spouses may do, and even if they divorce, but in this context the focus is upon what constitutes their continuing relationship. Augustine never coordinated these two aspects of his conception of marriage, or the two lines of argument and discourse associated with them, although there is no doubt that he believed them to be closely related. This failure is one manifestation of that fact that his conception of marriage as a holy condition representing Christ's union with the Church focused upon indissolubility rather than upon the relationship of *being* married.

### *Conclusion*

We began this chapter by admitting that one cannot define the term "sacrament" in Augustine's treatment of marriage. Augustine himself was inclined to qualify *sacramentum* with the word *quoddam*: the benefit, in other words, is a "kind of a sacrament" or "what might be called a sacrament."<sup>65</sup> How, then, might one answer the questions "what is the benefit of sacrament?" and "what does he mean by 'sacrament'?" This much

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<sup>64</sup> *Opus imperfectum in Matthaeum* 32, *PL* 56:802. On the probable authorship of the commentary, see P. Nautin, "L'*Opus imperfectum in Matthaeum* et les Ariens de Constantinople," *Revue d'Histoire ecclésiastique* 67 (1972), 380-408 and 745-66.

<sup>65</sup> *De bono coni.* 7 and 17, *CSEL* 41, pp. 197 and 209; *De nupt. et conc.* I. 11, *CSEL* 42, p. 222.



can be said in reply. When Augustine says that there is a sacrament in marriage, he means at least three things: first, that marriage is indissoluble, and that this attribute is what makes it a holy and sacred condition; second, that there is a symbolic and representational relation between marriage and Christ's union with the Church; third, that marriage, by virtue of its indissolubility, is analogous to baptism.

Augustine's reasons for introducing the analogy with baptism are difficult to discern. It was not just an illustration. Rather, as an extension of the analogy between marriage and Christ's union with the Church (for Christians become united to Christ through baptism), he probably meant it to support his rigorist interpretation of Jesus' teaching on divorce and remarriage. Baptism provided an example of what Christ demands from his followers and of the price he exacts.

One might ask whether, according to Augustine, the sacrament exists only in Christian marriages. How one understands this question depends upon what one considers the sacrament to be. On the one hand, the question may be whether a certain ontological bond exists between spouses who have not been baptized. On the other hand, the question may be whether non-Christians are not subject to the law of indissolubility or, on the contrary, are subject to it but in their ignorance disobey it. Be this as it may, Augustine does not say in so many words that the sacrament exists only in the Church. Rather, he says that it is only in the Church that one finds the "sanctity of the sacrament," and he says that "the observance of the sacrament" is so great in the Church that a man may not put away his wife even if she is barren.<sup>66</sup> Again, he affirms that the sacrament "should be observed chastely and concordantly,"<sup>67</sup> and he refers to the third benefit as something that "ought to exist in married persons, especially in those who belong to the people of God."<sup>68</sup> It would be wrong to attribute to him the doctrine that the sacrament exists exclusively in the marriage of Christians, although it would be rash to attribute to him the opposite theory, for the sense of the word *sacramentum* in his treatment of marriage was neither clear nor fixed.

<sup>66</sup> *De bono coni.* 32, p. 227; *De nupt. et conc.* I.11, p. 223.

<sup>67</sup> *De nupt. et conc.* I.19, p. 231.

<sup>68</sup> *Contra Iulianum* V.12(46), *PL* 44:810: "... tertium bonum quod esse in coniugibus debet, maxime pertinentibus ad populum Dei, quod mihi visum est esse aliquod sacramentum, ne divortium fiat vel ab ea conjugue quae non potest parere. . . ."

*Augustine and the Christianization of marriage*

We find in Augustine's writings extensive and searching theological reflections upon the nature and purpose of marriage that sprang from the three chief New Testament sources of the Western Church's doctrine of marriage, namely: Jesus' teaching on divorce in the synoptic gospels; the fifth chapter of Ephesians; and the seventh chapter of Paul's first letter to the Corinthians.

From the first source, Augustine derived his doctrine of indissolubility and the analogy between marriage and baptism. It seemed to him that the peculiarity of the Christian conception of marriage was manifest above all in the prohibition of remarriage after divorce. This was for him one of the points at which the Christian could recognize how far he or she had been set apart from the heathens and from the Jews of the Old Covenant. From the second source (the fifth chapter of Ephesians), came the idea that marriage refers to (perhaps symbolizes or emulates) Christ's union with the Church. These two ideas come together in his theory of the sacrament in marriage. From the third source (1 Corinthians 7) came the theory of marriage as remedy. Augustine's reflections under the third heading enabled him both to situate marriage within the context of the Fall and salvation and to show how marriage was good while celibacy was better.

Without the example of Ephesians 5:32, the notion of a sacrament in or of marriage would probably never have arisen. Augustine's reflections upon the sacrament can be regarded as an attempt to explicate this text. He himself writes:

... not only fecundity, whose fruit is in progeny, nor only chastity, whose bond is fidelity, but also a certain sacrament of marriage is commended to married believers. Hence the Apostle said [in Ephesians 5:25]: "Husbands, love your wives, even as Christ loved the Church."<sup>69</sup>

Yet an analogy of love is not prominent in Augustine's treatment of the sacrament.

There is no reference to indissolubility in the discourse on marriage in the fifth chapter of Ephesians. On the contrary, the discourse is not about not being able to remarry but about being married. Wives should be subject to their husbands, and husbands should love their wives and cherish them as if they

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<sup>69</sup> *De nupt. et conc.* I.11, CSEL 42, p. 222.

were their own bodies and as Christ loved the Church. The treatment is idealistic, of course, but no more so than the beatitudes. Augustine's theory of the sacrament in marriage is not an expansion or explication of these thoughts. Rather, it focuses upon indissolubility, for in his mind it was this above all that made marriage a holy condition. Nor did Augustine argue from the nature of the marital relationship itself to indissolubility. That one could not under any circumstances whatsoever remarry as long as one's spouse was alive seemed to him to be something beyond all argument and compromise, something that brought one face to face with the ineluctable and unfathomable will of God.



PART FOUR

THE NUPTIAL PROCESS



## CHAPTER FOURTEEN

### BETROTHAL

In the early Middle Ages, getting married was a process rather than a simple act. The spouses initiated their marriage by their betrothal, and they consummated it by sexual intercourse. Other elements, such as customs of courtship and the nuptial liturgy, might occur at various points between these terms or before the betrothal. The state of partners after their betrothal but before they began to live together or before they consummated their marriage was intermediate and in some respects uncertain, for they were neither single nor married.

Although this model of marriage is one that we now associate with the early Bolognese canonists, and especially with Gratian (who died in the middle of the twelfth century), it may go back to the patristic era. Hincmar of Reims was the first writer to attempt to define it and to speculate about its nature and purpose, and Gratian's own formulation was dependent upon dicta that originated in Hincmar. The conception of becoming married to which Gratian was a witness was soon to become outmoded and replaced by the model that still survives today, with its distinction between two kinds of agreement: the promise to get married in the future (betrothal); and the agreement that makes one married (marriage).<sup>1</sup>

The origins and history of the early medieval model are obscure in part. It is difficult to determine how this Christian model differed from traditional Roman, Germanic and other European models. It is not clear to what extent we should attribute the nuptial process that we find in early medieval sources to Christianity. We do know that this model developed within a Christian culture, and that some patristic and some medieval thinkers attempted to provide theological interpretations and Scriptural justifications of some of its aspects.

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<sup>1</sup> In English, married persons are called spouses, and the word "spouse" comes from the French *épouse*, which likewise means "married woman," but the word *épouse* comes from the Latin *sponsa*, and this in turn is derived from *spondere*, "to promise." A *sponsa* is someone who has been promised in marriage. In classical usage and Roman law, therefore, a *sponsa* is not a spouse but a fiancée.

Although betrothal and consummation are correlative terms in the process of becoming married (for betrothal looks forward to consummation while consummation fulfils the betrothal), it will be convenient for our purposes to consider each of the two aspects in turn.

The Fathers attributed more significance to betrothal than was done in Roman law, for they considered it to be the first stage of getting married and not an incidental preamble. From their point of view, marriage was not merely something founded on the appropriate consents or on marital affection. Rather, marriage was a union that was founded on a solemn agreement (the betrothal) and became complete when the woman's father, family or guardian handed her over to her husband. According to Ambrose of Milan, for example, one may say that marriage, as opposed to adultery, is what happens when a man has a sexual relationship with a woman who has been betrothed and handed over to him.<sup>2</sup>

Betrothal was more binding under ecclesiastical than under Roman law, and Germanic influence later confirmed this difference. The Council of Elvira (ca. AD 300) decreed that parents who broke off a betrothal (*sponsalia*) should be excommunicated for three years. They were to be excused if either the *sponsus* or the *sponsa* had committed some grave offense (in other words, the parents were entitled to break off a betrothal in that case), but if the betrothed persons were guilty of immoral sexual relations between themselves ("si in iisdem fuerit vitium et polluerint se"), the betrothal could not be broken off. If the parents did break off the betrothal on these grounds, they were liable to the above sentence of penance.<sup>3</sup> As well as this conceptual difference, one finds a some new terminology.

#### *The Christian vocabulary of betrothal*

In classical usage, the word for "to promise in marriage" was *despondere* (or *spondere*), and a woman who had been promised

<sup>2</sup> *Epist.* 59 (ad Paternum), 1, *PL* 16:1234B: "si quis desponsata sibi et tradita utatur, coniugium vocat."

<sup>3</sup> Can. 54, Hefele-Leclercq vol. 1.1, p. 251. In the Carolingian Church, penalties for those who broke their betrothal promises were determined by ecclesiastical as well as by secular law: see Hincmar, *Epist.* 136, *MGH Epist.* 8 (*Epist. Kar. Aevi* 6), p. 98: "Et quia ecclesiasticae regulae de his etiam diffinitionis sententiam proferunt, qui sponsaliorum fidem infringunt. . . ." Cf. *Additamenta ad capit. reg. Franciae occident*, 68 (Council of Meaux, AD 845), *MGH Capit.* 2, p. 414.



in marriage was called a *sponsa*, from the past participle of *spondere*. The woman's fiancé was called her *sponsus*, a term derived by analogy with *sponsa* rather than directly from the past participle (since only the woman, and not the man, was considered to be promised in marriage).<sup>4</sup> The betrothal itself (that is, the act of becoming betrothed) was called the *sponsalia*.

The new usage involved the verb *desponsare* (or *sponsare*) and its derivatives *desponsata* (or *sponsata*) and *desponsatio*.<sup>5</sup> This terminology was rare in classical and imperial Roman law. It did not appear at all in the *Codex Theodosianus*, although the form *desponsata* occurred twice in Justinian's *Codex* (as a synonym for *sponsa*).<sup>6</sup> The gospels referred to Mary as Joseph's *desponsata*, however, and not as his *sponsa*. This usage was common in the writings of the Latin Fathers, and it had become predominant by the early Middle Ages. The Fathers nevertheless continued to use *sponsa* and its cognates, and Jerome, for one, seems to have regarded *sponsa* and *desponsata* as synonymous.<sup>7</sup> The Christian usage (that is, *desponsatio* and its cognates) predominated in the *leges*, although even here the parties to the betrothal were not uncommonly called *sponsus* and *sponsa*, and the betrothal was sometimes called *sponsalia*.<sup>8</sup> The shift in usage is evident in the laws on betrothed women in the Burgundian code of Roman law. These laws came from the Theodosian code, but where the latter had used the traditional language of *sponsa*, along with *sponsalia* and *despondere*, the Burgundian version denoted the betrothed woman by the word *desponsata*.<sup>9</sup> Here again, the forms *sponsa* and *desponsata* were synonymous.

<sup>4</sup> See Reydellet's comments in his edition of Isidore's *Etymologies* IX (1984): IX.7.4, p. 226, n. 345.

<sup>5</sup> See J. Gaudemet, "Originalité et destin du mariage romain." *Sociétés et mariage* (1980), pp. 159–63. W. von Hörmann, in *Quasiaffinität*, vol. 2 (1906), was the first to draw attention to the usage and its significance.

<sup>6</sup> *Cod.* 5.1.1: "Alii desponsata renuntiare condicioni ac nubere alii non prohibetur." The other text is *Cod.* 9.13.1 (AD 533), which begins: "Raptores virginum honestarum vel ingenuarum, sive iam desponsatae fuerint sive non. . . ."

<sup>7</sup> See for example Jerome, *Adv. Helvidium* 4, PL 23:196, in which the forms *sponsa* and *desponsata* are used indifferently, and in which the male correlative is *sponsus*.

<sup>8</sup> E.g. the rubric to *Lex Vis.* 3.6.3: *Ne inter sponsos discidium fiat*; and Rothair 178: "et post sponsalias factas et fabola firmata."

<sup>9</sup> *Lex Rom. Burg.* 27.1–3. Cf. *Cod. Theod.* 3.5.5. ("qui puellam desponderit alteri eandem sociaverit") and *Lex Rom. Burg.* 27.2 ("liceat parentibus puellam desponsatam alii matrimonio sociare").

The reasons for the ascendancy of the new usage and the precise sense of the various forms remain obscure. Nor is it clear how much significance one ought to attach to the shift. Clearly, insofar as *sponsa* and *desponsata* were synonyms, this was not simply a case of a new usage being coined for a new institution. It is possible that the words *sponsa* and *desponsata* sometimes meant different things, and similarly that *sponsalia* and *desponsatio* were not synonyms, although the evidence is inconclusive. If these terms have different meanings, *sponsa* and *sponsalia* referred to the initial betrothal, which might take place in infancy, while *desponsata* and *desponsatio* referred to a confirmed betrothal that required the active, consensual participation of the partners themselves. The differences between classical and Christian conceptions of betrothal were subtle and they developed gradually. The predominance of the new usage may reflect the influence of the Bible, but why did the translators of the gospels prefer *desponsata* to *sponsa*?

*Betrothal and benediction in the patristic period*

Tertullian says that "a betrothed woman [*desponsata*] is in a certain way a wife [*nupta*]," but adds that there is difference enough between "in a certain way" and "truly" in the case of the Virgin Mary, although the principle applies in other cases.<sup>10</sup> The point of these remarks is that a betrothed woman is going to become a married woman (a *nupta*), and thus in a virtual or anticipated sense is already her husband's wife. The Virgin Mary, on the contrary, was never going to be Joseph's *nupta*. Throughout the discussion that follows, Tertullian assumes that *nuptiae* involves sexual union. Since the betrothal looks forward to sexual union, it commits the *sponsa* and *sponsus* to become one flesh. He treats the condition of a woman who is going to marry (a *nuptura*) as a potential or virtual marriage. Hence Mary was never truly Joseph's *nuptura*.

Tertullian argues that since wives are veiled, so also should girls be veiled as soon as they have reached the age at which they begin to understand their own nature, and at which they are able to attract the concupiscence of men and to be married (*nuptias pati*). Likewise, Adam and Eve covered themselves as soon as they eaten the fruit of the Tree of Knowledge. A girl ceases to be a virgin (in a virtual way) when she is *able*

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<sup>10</sup> *De virginibus velandis* 6.2, CCL 2, p. 1215.

not to be a virgin.<sup>11</sup> The betrothed woman, from this point of view, is half-way along the path from potentiality to actuality:

... betrothed women [*desponsatae*] have Rebekah as their example [Gen. 24:64–65]. When she was being led to her unknown betrothed [*sponsus*], and was still unknown herself, as soon as she knew that the man whom she had seen from afar was he, she did not wait for the grasp of his right hand or the exchange of a kiss or the expression of salutation, but having confessed what she felt, that she was married [*nupta*] in spirit, she denied that she was a virgin by putting on the veil immediately.

Rebekah showed, Tertullian concludes, that she lived according to the discipline of Christ, for marriage (*nuptiae*), like fornication, is something that one may do in one's heart.<sup>12</sup>

According to this account, Rebekah was betrothed before being brought to her *sponsus* and before the kiss and the joining of hands took place. (Whether Tertullian would have called her a *desponsata* before the confirmation of the betrothal is not clear.) In a passage that comes shortly after the one quoted above, Tertullian presupposes that at least among Christians it is customary for the kiss, the joining of hands and the veiling to take place at the *desponsatio*:

If it is intercourse [*congressio*] with a man that makes her a woman [*mulier*], she should not be covered until after the experience of marriage [*nuptiarum passio*] itself. And yet even among the heathens women are led veiled to their husbands [i.e., at the nuptials]. If, however, they are veiled at the betrothal [*desponsatio*], because they are mingled with a man bodily and spiritually through the kiss and the [joining of] right hands, by means of which they first give up their modesty in spirit, through the shared pledge of conscience by which they mutually agree to their complete union [*tota confusio*], how much more will time veil them, without which they cannot be betrothed [*sponsari*] and by whose urging they cease to be virgins even without the betrothal [*sponsalia*].<sup>13</sup>

The time in question, as Tertullian explains next, is the age of puberty, which for girls is twelve years (and for boys, fourteen).

While the argument of these passages is strained and may be peculiar to Tertullian, they contain two important pieces of evidence.

First, Tertullian evidently presupposed a custom whereby the

<sup>11</sup> *Ibid.*, 11.1–2, p. 1220.

<sup>12</sup> *Ibid.*, 11.3, pp. 1220–21.

<sup>13</sup> *Ibid.*, 11.4–5, p. 1221.

betrothal was confirmed by means of rituals such as the kiss and the joining of hands. The bride must sometimes have worn a veil at this ceremony. It is less clear, but plausible, that Tertullian reserved the form *desponsatio* for this confirmation, so that a *sponsa* would become *desponsata* at this time. Once the betrothal had been confirmed, the woman's "prenuptials" had taken place and she was in some sense as good as married.<sup>14</sup>

Second, a striking and salient feature of Tertullian's treatment of betrothal in this discussion is his emphasis on virtuality and becoming. Getting married is not simply a change of state but a process of fulfilment or of realization whose *terminus ad quem* is the union of two in one flesh.

The betrothal kiss, which Tertullian regarded as an anticipated consummation of the marriage, did not occur in North Africa alone. When Constantine issued a law to the *vicarius* of Spain in AD 336 determining what happened to the betrothal gift if either party should die before they got married, the decision was to turn on whether or not the betrothal kiss had taken place. If the kiss had taken place ("interveniente osculo"), the survivor kept half the gifts while the remainder went to the heirs of the deceased. (In other words, half the gift remained valid and half was annulled.) If the kiss had not taken place, the entire gift became invalid and had to be returned to the *sponsus* (if he was the survivor) or to his heirs (if it was the *sponsus* who had died).<sup>15</sup> From this point of view, a betrothal that had been confirmed by the kiss was half-way to marriage.

At what point in the process from initial betrothal to consummated marriage did the nuptial blessing occur? We might well expect that the blessing would have been associated with the formation or confirmation of the betrothal rather than with marriage itself. Tertullian, as we have seen, associates the ritual of *dexterarum iunctio* with the betrothal, and not with the completion of marriage or with the nuptials. It is possible that Tertullian had in mind a pagan, and not a Christian, tradition, but from the Christian point of view, this ritual reenacted God's bringing of Eve to Adam as his wife in Genesis 2:22. Adam and Eve were supposed not to have consummated their union until after God had expelled them from Paradise. Once the betrothal had been confirmed by the joining of hands

<sup>14</sup> Cf. *De oratione* 22.10, CCL 1, p. 271, in which Tertullian, again discussing the betrothal kiss and the joining of hands, coins the verb *praenubere*.

<sup>15</sup> *Cod. Theod.* 3.5.6 (*Brev.* 3.5.5, *CJ* 5.3.16).

and sealed with a kiss, it might be regarded as a solemn and binding contract and even as a kind of virtual but unconfirmed and unratified marriage. There was good reason also to keep the religious aspects of marriage apart from consummation, and apart also from the nuptials of pagan tradition, which were far from solemn and included ribald and sometimes obscene symbolic references to fertility. In the Book of Tobit, the joining of hands and the blessing of the marriage took place at the betrothal (Vulgate Tob. 7:15). As it happened, this occurred immediately before the seclusion of the couple in their bridal chamber (8:1), but Tobias deferred the consummation of their marriage, so that they were "joined to God" for three nights before entering "their own marriage" (8:4).

Two early witnesses to the liturgical benediction of marriage confirm this expectation. The first is a rescript that Pope Siricius sent to Himerius, Bishop of Tarragona in Spain, in AD 385. (Himerius had addressed his questions to Damascus I, who had died in 384.) The text is as follows:

You have asked, regarding conjugal veiling [i.e., benediction], whether a man may accept in matrimony a woman who has been betrothed [*desponsata*] to another. This we prohibit absolutely, because the faithful consider that it is a kind of sacrilege to violate by any transgression the benediction that the priest confers on a woman who is going to be married [*nuptura*].<sup>16</sup>

According to the interpretation of some scholars, Siricius here rules that a woman who is unfaithful to her betrothed by marrying another man may not receive the nuptial benediction (in other words, her marriage to the second man cannot be blessed).<sup>17</sup> But Siricius does not prohibit benediction; he prohibits marriage. The point of the text, as Hincmar understood,<sup>18</sup> is that the woman is not free to marry another man once her betrothal has been blessed.

The rescript of Siricius suggests that a betrothed woman (a *desponsata*) became a married woman (a *nupta*) when she began to live with her husband (in other words, when the *deductio* took place). Consummation would have normally taken place at this time. There is no indication in Siricius's response that any liturgical celebration marked the *deductio*. Since in

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<sup>16</sup> *Epist. ad Himerium*, PL 13:1136 and PL 84:632. See also Gratian, C.27 q.5 c.50.

<sup>17</sup> See K. Ritzer, *Le mariage* (1970), p. 231.

<sup>18</sup> *Epist.* 136 MGH *Epist.* 8 (*Epist. Kar. Aevi* 6), p. 103.

this case the question was whether a betrothed woman who had already been blessed might marry another man, it must have been customary to bless the union at some considerable time before *deductio* and consummation. Benediction was associated rather with the betrothal than with the nuptials.

The word *desponsata* in this passage may denote the woman whose betrothal has been fully confirmed. She would be like Rebekah, as Tertullian envisaged the story, after she had met her *sponsus* and the rituals of the kiss and the joining of hands had taken place. What is surprising is that Siricius seems to assume that this *desponsatio* or confirmation is a liturgical matter. There is no other evidence that the word *desponsata* was restricted in this way. Unfortunately, we do not know to what question Siricius is replying. Be this as it may, he regards the blessing as the point of no return in the process from betrothal to marriage. He does not go as far as saying that marriage to another man would thereafter be invalid, but he does prohibit it. The *sponsa* and *sponsus* become inseparably united once the Church has joined them, and has thereby commemorated God's blessing and joining of Adam and Eve, even though some considerable time may elapse before the partners begin to cohabit and to share their conjugal bed. This doctrine was one consequence of the Christian tendency to treat marriage as something rather spiritual than carnal.

The other patristic text we should note here occurs in a letter of Pope Pelagius I (AD 556–61).<sup>19</sup> It concerns a woman who was betrothed to a certain cleric called Valentinus. The woman had hitherto been "veiled with another man" (*cum alio velata*). This man had died, and now she was to marry Valentinus. Pelagius ruled that since she had not been married (*nupta*) to the previous man but rather remained a virgin (*virgo permanens*) at the time of his death, there was no obstacle in ecclesiastical law to her taking the veil with Valentinus.

In this case, the woman's right to marry the second man was not in question. Rather, the question was whether her marriage could be blessed, for the Church would not bless a widow's marriage. In Pelagius's judgment, that she had been "veiled" with the other man did not of itself make her a widow, for she was never his *nupta* but rather remained a virgin. This must mean either that they had never consummated their

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<sup>19</sup> For the text, see Ivo of Chartres, *Decretum* VI.13, *PL* 161:473; Gratian, D.34 c.20 (130); and K. Ritzer, *Le mariage* (1970), p. 232, n. 65.

marriage, or, more probably, that they had never lived together. Pelagius's ruling, like that of Siricius, suggests that the confirmation of betrothal by benediction might take place well before the partners began to live together as man and wife.

The earliest extant liturgies for marital blessing and veiling, which date from the seventh and eighth centuries, are nuptial masses. Here the blessing marked the occasion when the spouses came together, and it was the religious version of secular nuptials. The benediction would normally take place immediately before the partners began to live as man and wife. As we shall see below and in the following chapters, sources from the Carolingian period presuppose this procedure. The evidence, such as it is, suggests that the place of the liturgical benediction in the nuptial process shifted, so that having been associated with the *desponsatio* in the patristic period, it became associated with the *deductio* in the early Middle Ages. The medieval pattern included, in its full form, what we should regard as a Christian wedding. Liturgical benediction always happened *in medias res*: that is to say, at some point between the initial betrothal of the partners (who may then have been minors) and the consummation of their marriage. At exactly what stage it took place was something that might have varied locally and over time without necessarily affecting any matter of principle.

*Betrothal and the Christianization of marriage*

Was the conception of betrothal that I have outlined above peculiar to Christianity? In Roman custom also, a woman would become betrothed to a man and would later become married to him by being brought to his home (the ritual of *in domum deductio*).<sup>20</sup> There is some evidence that a marriage did not exist in law unless and until the bride was taken to her husband's home. Betrothal was not a matter of great consequence under Roman law, but the notion that two distinct acts of agreement were involved, one with reference to the future and the other with reference to the present, did not appear until the high Middle Ages. The occasion for a solemn plighting of troth was the *sponsalia*, and there is no evidence that a distinct exchange of vows took place on the occasion of the marriage in the pre-Christian custom. The Bolognese glossators

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<sup>20</sup> On the traditional ceremonies, see S. Treggiari, *Roman Marriage* (1991), pp. 161–70.

of the twelfth century, who studied the *Digest* carefully, thought that marriage was constituted under Roman civil law by betrothal (*sponsalia*) plus the bringing of a woman to her new husband or into his home (*deductio*).<sup>21</sup> Marital agreement was distinct from betrothal in Roman law not because it was necessarily a distinct act of agreement but because, from the legal point of view, all that mattered was that the requisite consents had been made and that the spouses' intention to be married was genuine and settled. The form that these agreements took was immaterial. The difference in question was one of emphasis. Were there good Christian reasons for this emphasis?

Von Hörmann, who was the first to draw attention to the manner in which the Christian and classical notions of betrothal differed, suggested that betrothal and marriage coalesced in the marital rites of the Western Church, and that this process had already taken place by Tertullian's time.<sup>22</sup> In this ritual, he maintained, elements that had originally belonged to the *sponsalia*, such as the ring, the *arrha* and the kiss, must have occurred along with the joining of right hands (*dexterarum iunctio*) and the dotal document (*tabulae nuptiales*), which properly belonged to the nuptial. The evidence regarding the marital rituals observed by Christians during this early period, however, is sparse and difficult to interpret, and as Ritzer has shown, it is not even clear that there was an ecclesiastical liturgy of marriage before the fourth century.<sup>23</sup> In any case, even if the presumed shift in ritual did take place, it would probably have been a consequence, and not a cause, of the way in which Christians understood the betrothal.

Christianity may have inherited something of the Jewish notion of betrothal.<sup>24</sup> It is possible that Jewish nuptial rituals survived in the early Church, but the chief medium of this influence as far as the Western Church was concerned was the Hebrew Scriptures and the gospels. Some texts in the Old Testament indicate that a betrothed woman (a *sponsa*) was in some re-

<sup>21</sup> See C. Donahue, "The case of the man who fell into the Tiber," *American Journal of Legal History* 22 (1978), 1-53, esp. 21-22. The glossators were scholars of Roman civil law.

<sup>22</sup> W. von Hörmann, *Quasiaffinität*, vol. 2, pp. 12-60. See also Génestal in Esmein and Génestal, *Le mariage*, vol. 1 (1929), pp. 112-13, and Joyce, *Christian Marriage*, p. 46, who accept Hörmann's thesis.

<sup>23</sup> See K. Ritzer, *Le mariage* (1970), pp. 110 ff.

<sup>24</sup> See J. Gaudemet, "Originalité et destin du mariage romain," *Sociétés et mariage* (1980), pp. 147-49 and 161; and Esmein and Génestal, *Le mariage*, vol. 1 (1929), pp. 110-11.



spects already a wife (an *uxor*). An example of this equating of *sponsa* with *uxor* occurs in the following severe precept from Deuteronomy:

If a man has betrothed [*desponderit*] a girl who is a virgin, and someone finds her in the city and lies with her, you shall bring them both out to the gate of the city, and they shall be stoned: the girl, because she did not cry out, being in the city; the man, because he has humiliated his neighbour's wife [*uxor*]. (Deut. 22:23–24)

Deuteronomy 20:6–7, on preparations for war, declares that a man who has planted a vineyard and has not yet enjoyed its fruit should return to his home, for were he to die in battle, another man would enjoy the fruit. Similarly, a man who “has betrothed a wife and has not taken her” (“despondit uxorem, et non accepit eam”) should return home lest he should die in battle, for then another man might take his *sponsa*. Not only is the *sponsa* called an *uxor*, but the man completes his marriage simply by “taking” the woman. These texts associate taking with the enjoyment of sexual intercourse.

Deuteronomy 22:23–25 shows that a betrothed woman who was unfaithful to her intended was treated as an adulteress. In Hosea 4:14, the Lord declares, “therefore shall your daughters commit fornication [*fornicatio*], and your betrothed women [*sponsae*] shall be adulteresses [*adulterae*]. I will not visit upon your daughters when they commit fornication, and upon your betrothed women when they shall commit adultery. . . .” One might translate the word *sponsa* in this text by “spouse,” as the Douay and Authorized versions do, for there is no sharp distinction between betrothed and married women, and what distinguishes fornication from adultery is the fact that the women have become betrothed. As daughters they commit fornication, while as *sponsae* they commit adultery. (The principle that a betrothed woman who was unfaithful deserved to be treated as an adulteress was not unknown in Roman law.<sup>25</sup>)

The gospels say that Mary was both a *desponsata* and an *uxor* at the time when she was pregnant, and that Joseph “took” his betrothed. In this case, the act of taking is not associated with sexual consummation. Luke records that an angel was sent to Mary while she was a virgin betrothed (*desponsata*) to Joseph (1:27). In Luke 2:5, we find that when Joseph went to

<sup>25</sup> *Dig.* 48.5.14.3 (Septimius Severus, recorded by Ulpian). See also 48.5.14.8.

Nazareth with Mary, she was both his betrothed and his pregnant wife ("cum Maria desponsata sibi uxore praegnante"). Similarly, Mary is Joseph's *desponsata* in Matthew 1:18. Later, Matthew records, the angel urged Joseph to "take his wife Mary." Joseph took Mary, but they did not have sexual intercourse before Jesus was born.<sup>26</sup>

The grammar of Matthew 1:20 in the Latin versions—"noli timere accipere Mariam coniugem tuam"—permits at least two interpretations. On the one hand, the setting of the word *coniugem* in apposition to *Mariam* may mean that Mary was already Joseph's wife (his *coniux*) once she was his *desponsata*. One might translate the sentence thus: "do not be afraid to take your wife, Mary." This seems to have been how Augustine understood the sentence, for he argued that the angel who said it did not speak falsely (*fallaciter*).<sup>27</sup> On the other hand, the angel may have been telling Joseph to take Mary as his wife, presuming that betrothal became marriage when the *sponsus* took the *sponsa* (that is, when they started to live together), but before sexual consummation. This seems to have been Ambrose's interpretation.<sup>28</sup> Either way, betrothal was in some sense already marriage: it only remained for the *sponsus* to accept the *sponsa*, and no further exchange of vows or plighting of troth was necessary. In the normal course of events, sexual union would follow acceptance, although this third step, according to tradition, never took place in the case of Jesus' human parents.

The Jewish betrothal that Matthew describes was something quite different from the classical Roman *sponsalia*, for it was a binding agreement that had much of the legal force of marriage. Its fulfilment required only that the man should accept his wife, so that the couple began to live together in a sexual relationship. The Latin Fathers of the fourth century, who knew little about marital customs in first-century Palestine, were not quite sure what to make of Mary's betrothal.

While references to betrothal in the Bible must have confirmed the patristic conception, it is unlikely that the Bible itself was the determining factor, for these references could have been (and later were) interpreted in other ways.

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<sup>26</sup> Matt. 1:20: "noli timere accipere Mariam coniugem tuam." *Ibid.*, 1:24: "et accipit coniugem suam."

<sup>27</sup> Augustine, *De nuptiis et concupiscentia* I. 12, CSEL 42, p. 224.

<sup>28</sup> Ambrose, *Liber de institutione virginis* 6(41), PL 16:330C–331A.

It is possible that the Latin Fathers' conception of betrothal was a form of vulgarization (from a Roman point of view); that is to say, a product of popular and regional influences. Nevertheless, there were two good Christian reasons for this conception. Even if these reasons did not cause it, they must have confirmed it. First, from the Christian point of view, marriage was a compact and not merely a "social fact." Insofar as the authorities insisted on the permanence of marriage, the Church was less casual about the consent to marry than the civil law had been. Insofar as marriage was permanent, getting married required a solemn and binding pledge. The promise to marry (the *sponsalia*), which was the only formal pledge in the classical pattern, thereby took on greater significance. Second, Christians considered marriage to be the union of two in one flesh. The agreement to marry, while solemn and binding in its way, remained to be consummated by sexual intercourse. It is to this other aspect of the Christian pattern that we now turn.

## CHAPTER FIFTEEN

### CONSUMMATION

In Christian literature, the topic of consummation (that is, the perfection of marriage by means of the first post-marital act of coition) may appear in either of two contexts. The first has to do with when a marriage becomes indissoluble, and the second with the place of sexual intercourse in marriage. Roughly speaking, we may say that the first question was canonical and the second spiritual or theological. Treatments of the second question often consider the marriage of Mary and Joseph, for if they were truly married, and if any husband and his wife are truly married even before they come together sexually, then it seems that sexual intercourse is not integral to marriage. This raises again the question: what is marriage?

#### *The meaning of "nuptiae"*

The Christian usage of the words *nuptiae* and *nubere* differed from that of Roman law, for these terms came to refer to completed and especially to consummated marriage. (We have noted examples of this usage in the previous chapter.) In classical Latin, the verb *nubere* simply meant "to get married" or "to marry." It was supposed to have come from *nubes* ("cloud"), and thus to signify the bridal veil. The verb *obnubere* meant "to veil."<sup>1</sup> Hence *nuptiae* chiefly denoted the wedding or nuptials, but the word could also denote the act of getting married, whether or not there were nuptials, and by extension the condition of being married.

The words *nubere* and *nuptiae* were also used metonymically to refer to sexual intercourse, in much the same way as we speak of persons sleeping together. This usage seems to have come from Greek, but it was well known in classical Latin. An example of the equivalent metonymy in Greek occurs in a play by Demosthenes, where someone says that a certain woman has been practising nuptials (*gamoi*) in broad daylight in an outhouse.<sup>2</sup> In other words, she was working as a prostitute.

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<sup>1</sup> Cf. Isidore, *Etym.* IX.7.10, ed. Reydellet (1984), p. 229.

<sup>2</sup> *De corona* 129.

The metonymy was familiar enough in Latin for it be used in a play on words. In Plautus's *Cistellaria*, for example, when one prostitute says to the mother of another, "it would have been better to marry her to someone [*viro dare nuptum*] instead," the mother's reply plays on the sense of the verb *nubere* ("to marry"):

Well, so she does, for goodness' sake! She marries a man every day, she has married today and she'll marry tonight. I've never let her sleep husbandless [*vidua*]. For if she didn't marry, her family would starve to death.<sup>3</sup>

The author of the *Rhetorica ad Herennium* (written ca. 85 BC) includes this usage as an example of metaphor (*translatio*). One use of metaphor, he explains, is to avoid obscenity: for example, one may say that someone's mother "delights in daily nuptials [*nuptiae*]."<sup>4</sup>

Similarly, in early medieval Latin the verb *nubere* could mean "to have sexual intercourse."<sup>5</sup> This usage occurs in a rule that appears in Benedictus Levita and in the penitential ascribed to Theodore of Canterbury. The rule permits divorce on the ground of non-consummation:

If a man and a woman have been joined in matrimony, and later the woman says that the man is unable to have sex with her [*nubere cum ea*], and if someone can prove that this is true, she may marry another man.<sup>6</sup>

The phrase *nubere cum ea* might also be translated "to consummate the marriage."

Since *nuptiae* connotes sexual intercourse, it is not surprising that some considered marriage *qua nuptiae* to be incomplete until it was consummated. A constitution issued by the Emperor Zeno in AD 475 refers to certain Egyptians who suppose that a man may marry the wife (*coniux*) of his brother when the latter has died provided that she has remained a virgin. They reason, as do certain legislators, that the partners do not really contract marriage until they come together carnally ("cum corpore non convenerint, nuptias re non videri

<sup>3</sup> *Cistellaria* 42–43 (Loeb edition of Plautus, 1917, vol. 2; my translation).

<sup>4</sup> *Rhetorica ad Herennium* IV.34 (Loeb edition, 1954, p. 342).

<sup>5</sup> See the article on *nubere* in Du Cange's *Glossarium*.

<sup>6</sup> *Penitential* II.12.33, ed. Finsterwalder, *Die canones Theodori Cantuariensis* (1929), p. 330 (or Haddan and Stubbs, p. 201); Ben. Lev. II.55 and 91 (PL 97:737 and 760).

contractas"). According to Zeno, such alliances are contrary to the ancient laws and are illegitimate.<sup>7</sup> This text reveals how ancient was the coital theory of marriage that we usually associate with the canonists of the high Middle Ages.

Because the word *nuptiae* connoted sexual intercourse, it was an apt name for the relationship of spouses who had come together and begun to cohabit. Scripture confirmed this usage. St Paul says in 1 Corinthians 7:11 that a wife who leaves her husband should remain *agamos* ("unmarried"), and the Latin Bible translates *agamos* as *innuptus* (*nuptus* being the past participle of *nubere*). According to a doctrine established in the late fourth and early fifth centuries in the Latin West, either spouse could divorce the other for adultery (and on that ground alone), but under no circumstance could either remarry as long as the other lived. A person who had legitimately divorced his or her spouse was to remain *innuptus*. The way in which this text was collated with Jesus' statements on divorce in the gospels suggested that the remarriage of an "unmarried" spouse was adulterous, and this in turn implied that the unmarried person was still in some way married to his or her partner. There was some inconsistency in the tradition as to whether one should draw this logical conclusion, but Augustine did so explicitly and dogmatically.<sup>8</sup> From this perspective, it seemed that while a divorce severed the life-sharing union and its mutual obligations, including the conjugal debt, the marriage nonetheless endured. The condition of being *nuptus* was something more than being simply married, and the spouses did not become *nupti* until they began to live together.

The word *nuptiae* lost some of its sexual connotation in early medieval Latin, where it was associated rather with the celebration of nuptials. *Nuptiae* in this sense began when the formalities and celebrations were complete. Hincmar of Reims, while emphasizing the role of consummation in marriage, maintains that the *sponsa* and *sponsus* "come together" and begin to be man and wife (*coniuges*) when the celebration of nuptials (*nuptiae*) has been completed. From this moment, other things being equal, the marriage is indissoluble. (In the normal course of events, sexual union would take place soon after the nuptials.) Hincmar refers to persons who have completed the formalities and rituals of marriage but have not yet come

<sup>7</sup> *CJ* 5.5.8.

<sup>8</sup> See Augustine, *De adulterinis coniugiis* II.4, CSEL 41, p. 386.

together carnally as *nuptiati sed innupti* ("married but unmarried"). The word *nuptiati* is the past participle of the late or vulgar Latin verb *nuptiare* ("to marry"). Hincmar probably uses it here because it does not have the sexual connotations of *nubere* and because *innuptus* has come to mean "married but not cohabiting." Once the betrothal has been confirmed by means of the *arrha*, dotation and benediction, the sacrament of Christ and the Church (*Christi atque ecclesiae mysterium*) has been "directed" to its perfection, although it has not yet been completed in sexual union. The marriage of Mary and Joseph had reached this stage when the angel told Joseph to accept his wife Mary.<sup>9</sup>

*The role of sexual union in marriage*

Common sense suggests that marriage normally involves coitus, and that marriage is a variety or species of sexual relationship. The ambiguity of the word *nuptiae* in classical usage would be evidence, if evidence were needed, of this fact. Tertullian refers to coitus euphemistically as the *matrimonii res*, a phrase that one might loosely translate as "what goes on in marriage."<sup>10</sup> Despite the example of Mary and Joseph, the Fathers usually treated virginity and marriage as mutually exclusive alternatives. Moreover, as Hincmar recognized, ecclesiastical prohibitions of marriage pertained to sexual relations. A marriage within the prohibited degrees, for example, was incestuous and invalid because sexual intercourse would have been incestuous. Similarly, remarriage while the former spouse was still alive was adulterous because sexual intercourse would have been adulterous. Hence in the regime of the Western Church, a person who had remarried after a valid divorce could not do satisfactory penance without suspending sexual relations with the second partner, but satisfaction did not strictly require that he or she should leave the second partner (although this was no doubt the preferred course of action).<sup>11</sup> While it

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<sup>9</sup> *Epist.* 136, *MGH Epist.* 8 (*Epist. Kar. Aevi* 6), p. 103, lines 28 ff.: "Fornicationis autem causa separati aut innupti manebunt aux ex consensu mutuo sibimet reconciliabuntur. De nuptiatis autem, sed innuptis, id est de nuptiarum celebratione, in quibus arrae sponsaliorum et benedictio sacerdotalis et dotationis confirmatio et Christi atque ecclesiae mysterium ad completionis perfectionem dirigitur, sed non carnis unione completur. . . ."

<sup>10</sup> *Adv. Marcionem* I.29.3, *CCL* 1, p. 473, lines 9–10.

<sup>11</sup> See Jerome, *Epist* 55 (to Amandus), 5(4), *CSEL* 54, p. 494; and Augustine, *De adulterinis coniugiis* II.15–16, *CSEL* 41, pp. 400–02.

may always be difficult to determine precisely how coitus enters into the definition of marriage, the prevailing attitude of most cultures is such that the question hardly arises. People simply assume that coitus is (as Tertullian puts it) the *res* of marriage. The Fathers and their medieval successors, on the contrary, found the relationship between coitus and marriage to be acutely problematic.

From the Jewish perspective, there seemed to be no great difficulty here. Procreation was a divine blessing, and to remain celibate was to spurn this blessing. The Jews regarded the Christian preference for celibacy as ridiculous and even blasphemous.<sup>12</sup> The rabbis usually maintained that Adam and Eve had consummated their marriage in the Garden of Eden. Some Jewish sources assumed that consummation had taken place outside the Garden, but as Gary Anderson has shown, this was not because these interpreters thought that a fall had taken place, but because they reasoned that the Garden was a temple. The laws of purity prohibited sexual intercourse in such a setting. In *Jubilees*, Adam and Eve consummate their marriage *before* entering the Garden.<sup>13</sup>

It was a premise of rabbinic marriage law that a man's betrothed became his wife when their sexual relationship began (or at least might be deemed to have begun). Maimonides says that a girl is forbidden to have sexual intercourse with her betrothed as long as she remains in her father's house, but that "he who has intercourse with his spouse after betrothal and for the purpose of marriage, acquires her and makes her wedded to him from the moment he initiates the intercourse with her, and thereafter she is his wife in every respect." In the normal course of events, she is deemed to be his wife when they have been secluded in the *huppah* (the bridal tent or chamber). The man takes the bride into his own house, secludes himself with her, and thereby makes her exclusively his own. "Once she has entered the bridal chamber," Maimonides explains, "she is called married, even if her husband has not yet had intercourse with her, provided she is fit for intercourse." A bride who enters the chamber while menstruating will remain the man's betrothed because "the nuptials

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<sup>12</sup> See G. Anderson, "Celibacy or consummation in the Garden?", *Harvard Theological Review* 82 (1989), p. 122.

<sup>13</sup> *Jubilees* 3:4–9. G. Anderson, "Celibacy or consummation in the Garden?", *Harvard Theological Review* 82 (1989), 121–48.



are not yet complete and she still has the status of an espoused woman, even if she has already entered the bridal chamber and has been secluded with her husband."<sup>14</sup> These rules are based on the ancient idea that a betrothed woman becomes a wife when she enters her husband's tent and the marriage is consummated. Thus Psalm 19:4–5 likens the rising sun to a newly married man coming out of his tabernacle (*huppah*).

This model of marriage, with its focus upon sexual union and its conception of betrothal as an agreement that is fulfilled when the sexual relationship begins, is natural enough. It owes something to the social circumstances of marriage, in which parents agree that their offspring should leave them and establish new homes, and something to its biological circumstances (that is to say, to sexual desire). The betrothal is like a promise inasmuch as it is a prospective agreement, but it is really an unconsummated marriage. To some degree the contractual and consensual aspect of marriage is temporally distinct from the corporeal and life-sharing union, for the compact is formed before the latter begins.

One writer has argued that "the expression ['two in one flesh'] does not designate sexual union in genital intercourse; or it does so only remotely. It designates primarily that the man and woman stand as one person before the people and the law."<sup>15</sup> This fails to take account of the central place of sexual union in the rabbinic law of marriage. Moreover, in 1 Corinthians 6:15–17, Paul applies Genesis 2:24 to the case of fornication with a prostitute. Since the Christian man is a member of Christ, Paul argues, he must not have sex with a prostitute because he would thereby become one body with her; for it is written, "they shall be two in one flesh," and union in one flesh with a prostitute is incompatible with union in one spirit with Christ. At least in Paul's mind, the union in one flesh is more than remotely related to sexual intercourse. It was Paul who added coitus to the conjugal debts that each partner owes the other.<sup>16</sup>

Paul's application of Genesis 2:24 to fornication is surprising.

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<sup>14</sup> *The Code of Maimonides*, Book IV, *The Book of Women* (I.10.2), trans. I. Klein (1972), pp. 61–62. Maimonides died in 1204, but I assume that what he says conveys an ancient tradition in spirit, even if not in every detail.

<sup>15</sup> T. Mackin, "Ephesians 5:21–33 and radical indissolubility," in *Marriage Studies* III, ed. T. P. Doyle (Washington D.C., 1985), p. 32.

<sup>16</sup> 1 Cor. 7:3. Cf. Exod. 21:10.

Rabbinic law recognized sexual intercourse as a valid, albeit improper, means of establishing a betrothal.<sup>17</sup> If this is what Paul had in mind, his reference was ironic, for sexual intercourse would only have established betrothal in the case of a virgin.<sup>18</sup> Moreover, there is an implied incongruity or absurdity inasmuch as one prostitute becomes one flesh with many men. Be this as it may, Paul clearly regards the union in one flesh as a form of sexual union.

The notion that sexual intercourse *per se* creates some form of permanent union, even outside marriage, is implicit in the medieval understanding of the impediment of affinity, for simple fornication created relationships of affinity. For example, a man could not marry the sister of a woman with whom he had had sexual intercourse.

The Vulgate version of the Book of Tobit (which we owe to Jerome) contains one attempt to treat marriage positively but from an ascetic perspective. Episodes emphasizing the virtue of sexual continence have covered over a more typically Jewish treatment of marriage. It is only in Jerome's version that we find the story of the "nights of Tobias," in which the newlyweds devote themselves to prayer and abstinence for three nights before coming together carnally.<sup>19</sup> In the other versions, Tobias simply prays before consummating his marriage. These three nights entirely alter the character of the episode.

The original version of the book was probably in Aramaic, but it is no longer extant. Jerome explains in his preface that he used a Chaldaean (that is, an Aramaic) text. Because he did not know the language, a rabbi translated the text into Hebrew and Jerome translated this into Latin. (It is evident, however, that he was much influenced by the Old Latin version.) We may perhaps attribute some of the peculiarities of the Vulgate version to Jerome himself. Jane Barr has shown how Jerome's attitude to women conditioned his translation of particular words

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<sup>17</sup> *Mishnah Ket.* 4.4 and *Kid.* 1.1. Maimonides comments (*ibid.*): "Even if he had betrothed her by way of sexual intercourse, he is forbidden to have intercourse with her a second time while she is still in her father's house, until such time as he may bring her into his own house, seclude himself with her, and thus set her aside exclusively as his own."

<sup>18</sup> Cf. Deut. 22:13–21 and Matt. 1:19.

<sup>19</sup> Some of the continence passages also appear in the 13th-century Hebrew version of the work discovered by Gaster, but this text may well have been influenced by the Vulgate. For the relevant passages, see Gaster's translation in *Proceedings of the Society of Biblical Archaeology* 18 (1896), pp. 259–71 (*passim*).

and phrases in Genesis.<sup>20</sup> But this tendency can hardly explain such gross interpolations as the story of the nights of Tobias. The theme of continence may be due to Christian influence, but it is likely that Jerome found the interpolated theme in his Aramaic version.

The theme of continence first appears in Sarah's prayer of despair and lamentation (Tob. 3:14–16):

You know, O Lord, that I never desired [*concupivi*] a man and have kept my soul clean from all lust [*concupiscentia*]. Never have I joined myself with them that play; neither have I made myself partaker with them that walk in lightness. But I consented to take a husband out of fear of you, not out of my own lust.

The theme appears again when Azarias (alias Raphael) allays Tobias's not unreasonable fears about marrying Sarah. It is because of their lust that Sarah's previous seven husbands succumbed to the demon and died on their wedding night. They approached marriage in such a way "as to shut out God from themselves, and from their mind, and to give themselves to their lust [*libido*], as the horse and the mule, which do not have understanding. Over them the devil has power" (Tob. 6:17). Raphael tells Tobias that when he and Sarah go to their nuptial bed, they should refrain from consummating their marriage, and that for three nights they should remain continent and devote themselves to prayer (vv. 18–22).

On the first night the demon will be driven away, and on the second Tobias will be "admitted into the company of the holy patriarchs." On the third night, says Raphael, "you will obtain a blessing that sound children may be born from you." After this, Tobias should have intercourse with Sarah, but only for the sake of procreating children: "you will take the virgin with the fear of the Lord, moved rather by love of children than by lust [*libido*], so that in the seed of Abraham you may obtain the blessing of children." Tobias tells Sarah that for three nights they will be "joined to God;" only after the third night is over "will we be in our own marriage" (Tob. 8:4). The theme of continence appears again in Tobias's prayer: "And now, O Lord, you know that not for fleshly lust do I take my sister to wife, but only for the love of posterity, in which your name may be blessed for ever and ever."

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<sup>20</sup> Jane Barr, "The Vulgate Genesis and St Jerome's attitude to women," *Studia Patristica* 18 (1982), 268–73.

Although the book could be read allegorically,<sup>21</sup> it was above all Tobit's theme of continence that interested moralists of the early Middle Ages like Jonas of Orléans (d. 843).<sup>22</sup> Having argued at some length that one should get married or have sex only for the sake of procreating children, and not out of lust, Jonas turns to criticize the lax morals of the laity.<sup>23</sup> Because they are driven by lust or because they postpone getting married for the sake of achieving an advantageous match, many men fail to preserve their chastity until marriage.<sup>24</sup> In this way, they lose both the original benediction by which God blessed Adam and Eve and the nuptial benediction that priests confer "according to canonical authority and the practice of the Roman Church." For this reason, couples rarely receive the nuptial blessing, and they beget illegitimate children. "Therefore," says Jonas, "those who want to take wives should listen to how the angel Raphael instructed Tobias regarding the woman he was going to marry." Here Jonas quotes Tobit 6:17–22, in which Raphael explains to Tobias what to do to avoid harm when he marries Sarah: how they should abstain for three nights, devoting themselves to prayer, and so on. Perhaps those who do not take the advice of priests seriously, Jonas concludes, will at least pay heed to the instruction of an angel!

Jonas is not advocating the practice of the nights of Tobias. Rather, he uses the story to show that men should preserve their chastity until marriage. An early reference to the nights of Tobias, however, occurs in a description of the nuptial process in the pseudo-Isidorian forgeries. After the formalities of petition and dotation have been fulfilled and the nuptial mass has taken place, the couple should "devote themselves to prayer and preserve their chastity for two or three days, so that good offspring are generated and that they may please the Lord by what they do."<sup>25</sup> Caesarius of Arles is said to have introduced a custom whereby a priest would bless the bride and groom three days *before* they became married, so that they might show due

<sup>21</sup> See Bede, *In librum beati patris Tobiae*, CCL 119B, pp. 3–4, 6–7, 10 etc.

<sup>22</sup> *De institutione Laicali* II.1–2, PL 106:168D ff. Cf. Ben. Lev. II.230 and III.388 (PL 775A and 847A), which affirm that marriage should be undertaken for the sake of procreating children and not *causa luxuriae*.

<sup>23</sup> II.2, PL 106:170D–171C.

<sup>24</sup> Cf. Caesarius of Arles, *Sermo* 43.5, CCL 103, p. 192; Ben. Lev. II.230 and III.388 (PL 775A and 847A).

<sup>25</sup> Ps.-Evaristus, PL 130:81B–C. The text also appears in Ben. Lev. III.463, PL 97:859, and is quoted (ascribed to Evaristus) in Hincmar, *De divortio*, PL 125:649A–B.

reverence to their benediction.<sup>26</sup> It is very likely that this custom owes something to Tobias's three nights of continence. The aim must have been to keep benediction well apart from coitus.

One effect of Tobit's influence may have been to encourage the idea that the joining of a couple by God takes place before, and not at the time of, the consummation of their marriage. In Tobit, three nights of continence and prayer intervene between the seclusion of the couple in the nuptial chamber and the consummation of their marriage. During this period the partners are "joined to God," and only after this do they enter "their own marriage" (here called *coniugium*). By this time the nuptial feast has already taken place. Similarly, God joined Adam and Eve as man and wife in Paradise, but sexual intercourse did not take place between them until after their expulsion from Paradise. Such influences may account for the complex model of the nuptial process we find, for example, in Hincmar of Reims, where God joins the couple irrevocably (other things being equal) at the time of the benediction, but where the marriage is nevertheless not completely formed as the union of two in one flesh until carnal consummation takes place. Whatever the sources of this idea may have been, it was one way of resolving the intolerable tension implicit in the notion that marriage is both a union of two in one flesh and a union made by God.

*Consensualism and coitalism in the Fathers*

From the Christian point of view, marriage was both blessed and cursed. While some thinkers, such as Ambrosiaster and Julian of Eclanum, saw nothing in marital sex to be alarmed about, the most influential of the Latin Fathers reviled sexual intercourse. They espoused celibacy as the way to escape from defilement, from the blandishments of women and from mundane preoccupations. On the other hand, they could not denigrate marriage. Jesus had blessed it by affirming its permanence and by what he did at Cana. God had blessed it in the beginning. If marriage was evil, who was the God who had created and blessed it? The Fathers had to distance their own position from that of the Gnostics.

To some extent, the tension could be resolved eschatologically. Tertullian, Jerome and Augustine, for example, maintained

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<sup>26</sup> *Vita Caesarii episcopi Arelatensis* I.59, *MGH Script. Rer. Mer.* 3, p. 481, lines 15–16.

that there had been a duty to procreate under the old dispensation, but that this obligation no longer obtained under the new dispensation that Christ had introduced. The "time to embrace" had passed, and the "time to refrain from embracing" had come. The Fathers also maintained that marriage was good not despite lust but because it provided a remedy for lust. And while Christian exegetes assumed that sexual intercourse never took place in Eden, some (like Augustine) were courageous enough to argue that sexual intercourse would have taken place in Paradise if sin had never entered into the world. This theory made it clear that marriage and sexual procreation *per se* were good.

These solutions may have satisfied the intellect, but they could not satisfy the heart. How could one maintain both that marriage was a good and holy condition and that what normally went on in marriage was vile? The tension was difficult to maintain. Some (like Jerome) assumed that marriage was an essentially sexual relationship, and tended for this reason to take a dim view of it. Others (like Augustine) maintained that marriage was a holy and sacred institution, and reasoned that sexual intercourse was not integral to it. Did not the example of Mary and Joseph suggest that marriage was not an essentially carnal relationship? Those who reasoned along these lines found some support in Roman law, where there was nothing like the rabbinic rules on consummation. There was a general and implicit assumption that marriage involved cohabitation, coitus and the intention to procreate, and a marriage was not recognized without the *deductio* of the bride to her husband or his home, but the *deductio* was only a notional beginning of cohabitation. It could even happen in the husband's absence. Roman law emphasized not cohabitation and coitus but acts and conditions of the mind: that is, on consent, intention and attitude. Hence the slogans ascribed to Ulpian: "nuptias enim non concubitus sed consensus facit" (*Dig.* 35.1.15 and 50.17.30); and "non enim coitus matrimonium facit sed maritalis affectio" (*Dig.* 24.1.32.13).

Christian attitudes to consummation were inevitably complex and ambivalent, for while there was good reason to play down the importance of sexual union in marriage, the early Church inherited from the Jewish tradition a conception of marriage whose focus was on sexual union. Such was inescapably the teaching of the Bible. In marriage, a man leaves his father and mother and cleaves unto his wife, and they become

two in one flesh (Gen. 2:24). Jesus himself deduced from this that marriage should be permanent:

Have you not read that he who made them in the beginning made them male and female, and said: "For this reason shall a man leave his father and mother and cleave unto his wife, and they shall be two in one flesh." Accordingly they are no longer two, but one flesh. What therefore God has joined together man should not separate. (Matt. 9:4-6)

Jesus did not distinguish between carnal union and the union that God made and no man could separate, and it was the union in one flesh or in one body that the author of Ephesians likened to the union between Christ and the Church. A man should love his wife as if she were his own body, and as Christ loves his own body, which is the Church (Eph. 5:21-33).

Christian exegetes could not but associate sex with the Fall, and all assumed that sexual intercourse did not take place until after the expulsion from Eden. Many considered that sexual procreation, while good, could not have happened in Paradise. Augustine was of this opinion at first, and although he became convinced in due course that there *would* have been sexual procreation even if sin had never entered into the world, his earlier thinking left a permanent mark upon him. He remained convinced that marriage, even though created for the sake of sexual procreation, did not require coitus for its completeness. Coitus and procreation, from this perspective, were in some way additional to the essence of marriage, and not integral to it.

The focus of this aspect of Augustine's treatment of marriage is Mary's relationship to Joseph. He writes in the *De nuptiis et concupiscentia*:

... the angel did not speak deceitfully to Joseph when he said: "Fear not to take Mary your wife" [*coniux*]. She is called wife from the first troth of the betrothal, although he had not known her carnally nor was to do so. The name of "wife" was not destroyed nor did it remain as a lie, although there had not been nor was there going to be any sexual intercourse.<sup>27</sup>

Similarly, in his sermon on the genealogy of Christ, Augustine takes issue with any who would argue that Joseph, because he did not have sexual intercourse with Jesus' mother,

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<sup>27</sup> *De nupt. et conc.* I.11, CSEL 42, p. 224. Cf. Isidore, *Etym.* IX.7.9, ed. Reydellet, p. 229.

was not Jesus' father, "as if it were libido, and not conjugal charity, that makes a wife [*uxor*]."<sup>28</sup>

Like Augustine, Ambrose argues that Mary was Joseph's wife even though coitus did not take place, but his version of the thesis is more complex. One should not suppose, Ambrose argues, that Mary ceased to be a virgin because Joseph "took his wife" (Matt. 1:24). Rather, as someone who was already Joseph's *desponsata*, she took the name of wife. Ambrose explains that the relationship takes the name of marriage (*coniugium*) as soon as the marriage begins (*initiatum*), for "it is not the deflowering of virginity that makes marriage, but the marital compact." The marriage begins as soon as the girl is joined to her husband, rather than when sexual intercourse takes place.<sup>29</sup> This text was the source of Gratian's notion of *matrimonium initiatum*, but marriage is "initiated," according to Ambrose, not when the woman is betrothed but when her husband takes her. The position to which Ambrose adheres is close to that of Roman law, which deems that marriage begins at the moment of the *deductio*. Ambrose's maxim "non enim defloratio virginitatis facit conjugium, sed pactio conjugalitatis" is strikingly similar to Ulpian's "nuptias enim non concubitus sed consensus facit" (*Dig.* 35.1.15 and 50.17.30) and "non enim coitus matrimonium facit sed maritalis affectio" (*Dig.* 24.1.32.13).

If Augustine tended to consensualism, his adversary Julian of Eclanum tended to coitalism. According to Augustine, Julian said that "marriage [*nuptiae*] is nothing other than the union of bodies [*corporum commixtio*]."<sup>30</sup> Some of the Fathers considered that Joseph and Mary were husband and wife in name only and not in reality. According to Peter Chrysologus, for example, Joseph was Mary's husband in name but her *sponsus* in conscience.<sup>31</sup> According to Jerome, Mary remained Joseph's betrothed and never became his *nupta*. In maintaining this

<sup>28</sup> *Sermo* 51.13(21), *PL* 38:344: "quasi uxorem libido faciat, et non charitas coniugalitatis."

<sup>29</sup> Ambrose, *Liber de institutione virginis* 6(41), *PL* 16:331A: "Cum enim initiatum conjugium, tunc conjugii nomen adsciscitur, non enim defloratio virginitatis facit conjugium, sed pactio conjugalitatis. Denique cum jungitur puella, conjugium est, non cum virili admistione cognoscitur."

<sup>30</sup> *Contra Iulianum* V.16(62), *PL* 44:818.

<sup>31</sup> See Peter Chrysologus, *Sermo* 175.4, *CCL* 24B, p. 1066: "Ioseph ille maritus solum nomine, conscientia sponsus. . . ." L. Anné, "La conclusion du mariage dans la tradition et le droit de l'Église latine jusqu'au VI<sup>e</sup> siècle," *Ephemerides Theologicae Lovaniensis* 12 (1935), pp. 515–21, is a seminal discussion of this divergence of perspective among the Fathers.



thesis Jerome assumes that marriage qua *nuptiae* involves coitus.

Helvidius, against whom Jerome wrote his treatise on the perpetual virginity of Mary, argued that Mary must have come together carnally with Joseph after Jesus' birth. The Bible says that Mary conceived Jesus "when she had been betrothed to Joseph, before they had come together." Helvidius reasons that a woman is betrothed (*desponsata*) inasmuch as she is going to be married at some time in the future (*quandoque nuptura*). Furthermore, the proposition that Mary conceived *before* they came together (that is, before coitus took place) implies that they did come together later.<sup>32</sup> Jerome has no difficulty demolishing these arguments. He points out that to say that X happened before Y happened does not necessarily entail that Y did in fact happen. For example, it does not follow from the proposition "Helvidius died before repenting" that Helvidius repented after he died! The phrase "before they came together," therefore, means only that they were approaching the time at which marriage (*nuptiae*) would normally have taken place: that is, the time at which she who had been Joseph's betrothed (*sponsa*) would become his wife (*uxor*). The Evangelist means that Mary was found to be with child before they exchanged kisses and embraces (*oscula amplexusque miscerent*), and before they had sexual intercourse (*rem agerent nuptiarum*), for the time for this was near. In fact, Mary remained Joseph's *sponsa*.<sup>33</sup>

What of Matthew 1:20 and 24, in which Mary is called Joseph's wife (*uxor*)? Jerome puts this down to the vagaries of Biblical usage, explaining that Scripture often calls betrothed women "wives," as it does for example in Deuteronomy 22:23–25.<sup>34</sup> Why did Mary need to remain betrothed after she conceived Jesus? (In other words, in the usage of the Bible, why did she need a husband?) Jerome suggests three reasons: first, so that Mary's genealogy should be established through Joseph's; second, so that she should not be stoned as an adulteress; and third, so that she had a companion in the flight from Egypt. Joseph was rather Mary's protector (*custos*) than her husband (*maritus*).<sup>35</sup>

Jerome sums up his thesis in the following way:

<sup>32</sup> *Adv. Helvidium* 3, *PL* 23:194–195.

<sup>33</sup> *Ibid.*, 4, 195–96.

<sup>34</sup> See also Jerome, *Comm. in Matthaeum* 1:16, *CCL* 77, p. 9: "Cum uirum audieris suspicio tibi non subeat nuptiarum, sed recordare consuetudinis scripturarum quod sponsae uocentur uxores."

<sup>35</sup> *Adv. Helvidium*, 4, 196.

We believe that God was born of a virgin, because that is what we read. We do not believe that she married [*nuptisse*] after giving birth, because that we do not read. . . . You say that Mary did not remain a virgin. I claim even more: that Joseph was a virgin for the sake of Mary, so that from a virginal marriage [*coniugium*] a virgin son might be born. For since it is inconceivable that a holy man [like Joseph] would have committed fornication, and since it is not written that he had another wife (other than Mary, that is, whom he was said to have, although he was rather her protector than her husband), then it follows that he who was worthy to be called the father of the Lord remained a virgin with Mary.<sup>36</sup>

Jerome (I take it) assumes that Joseph was entitled, because his marriage was never consummated, to leave Mary and to marry another woman. It was not the bond of marriage that held him to her, but his duty and filial kindness. Joseph was not strictly Jesus' father, although he was *worthy to be called* Jesus' father ("pater Domini meruit appellari").

If husband and wife do not become *nupti* until their marriage is consummated, then there were no *nuptiae* in Eden. Jerome makes this point in the *Adversus Iovinianum*.<sup>37</sup>

As regards Adam and Eve, it should be said that in Paradise before their offense they were virgins. After they sinned, however, and outside Paradise, marriage [*nuptiae*] took place at once.

This is why the Apostle, having quoted the verse "For this reason the man shall leave his father and mother, and cleave unto his wife, and they shall be two in one flesh," adds: "This sacrament is great, I say, in Christ and in the Church." For Christ was a virgin in the flesh but was married (*monogamus*) in spirit. The Apostle had in mind Christ's monogamous union with the Church when he said, "Husbands, love your wives, even as Christ loved the Church." Jerome urges husbands to emulate Christ's union with the Church by loving their wives in chastity and holiness. Those who have wives should behave as if they did not.

The course that Jerome's argument takes here is curious, and his theory of the sacrament of Christ and the Church proceeds to a *reductio ad absurdum*. Having proposed Christ's union with the Church as the model for marriage, he goes on to argue that marriage should be chaste; but since he considers

<sup>36</sup> *Ibid.*, 19, 213.

<sup>37</sup> Jerome, *Adversus Iovinianum* I.16, PL 23:246A-C.

that coitus is integral to marriage, it transpires that the ideal he proposes for married persons is best observed by single persons. Married folk should imitate virgins and behave as if they were not married. Ideally, spouses should abstain from even licit sexual relations. One should take off the old man and put on the new, which is renewed in knowledge after the image of him who created him. Since there is neither male nor female in this image (Col. 3:10–11, Gal. 3:28), there is no place for sexual relations in the new man:

The image of the Creator does not possess the union of marriage [*nuptiae*]. Where sexual difference is removed, and we take off the old man and put on the new, there we are born again into the virgin Christ, who was born of a virgin and reborn through a virgin [i.e. John the Baptist].

“Marriage [*nuptiae*] fills the earth,” Jerome concludes, “and virginity Paradise.”

The precise difference between Jerome’s position and those of Ambrose and Augustine is difficult to determine. It is not a matter of outright opposition. On the one hand, Jerome assumes that there is no *nuptiae* without coitus, and his point is that Mary was never *nupta*, but he calls the unconsummated marriage of Mary and Joseph *coniugium*. Moreover, he accepts that Scripture often calls a betrothed woman *uxor*, although he considers this fact to be merely semantic. Jerome would not deny that Mary was called Joseph’s wife *ex prima desponsationis fide*, for like Augustine, he was aware that the Bible calls Mary Joseph’s wife even when she was still his betrothed.<sup>38</sup> Ambrose and Augustine, on the other hand, maintain that there can be *coniugium* without coitus and that Mary was truly Joseph’s *coniux* and *uxor*. They do not maintain that there can be *nuptiae* without coitus.

Did Augustine maintain that the sacrament in marriage was fully formed even without sexual consummation, *ex prima desponsationis fide*? The crux is whether an unconsummated marriage, such as that between Mary and Joseph, can or cannot be dissolved, for according to Augustine the sacrament exists inasmuch as marriage is indissoluble. Jerome seems to have thought that unconsummated marriage was dissoluble. Augustine, as far as I am aware, gives no direct answer to this

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<sup>38</sup> Matt. 1:20 and 1:24. Matt. 1:18 affirms that Mary was Joseph’s *desponsata* at this time, and she is called *uxor desponsata* (“betrothed wife”) in Luke 2:5.

question. It is not improbable that the right to divorce on the ground of non-consummation was already recognized in the ecclesiastical law of his era. Although there are passages in which Augustine affirms that the sacrament exists even before or without sexual union, his position is less clear than might be supposed.

Augustine writes in the *De bono coniugali* that "once marriage has been entered into in the city of our God, where even from the first joining of two persons marriage bears a certain sacrament, it can in no way be dissolved except by the death of one of them."<sup>39</sup> I take it that when he says "from the first joining," Augustine means "from the moment of betrothal and before coitus." Similarly, Mary was Joseph's wife as soon as they became betrothed (*ex prima desponsationis fide*).

Augustine says in the *De nuptiis et concupiscentia* that the marriage of Mary and Joseph possessed all three of the benefits of marriage, including sacrament:

Accordingly, every benefit of marriage was fulfilled in the parents of Christ: fidelity, progeny and sacrament. We know that the Lord Jesus himself was their progeny; that there was fidelity, because there was no adultery; and that there was sacrament, because there was no divorce.<sup>40</sup>

Augustine repeats this without significant alteration in the *Contra Iulianum*.<sup>41</sup> When he says that there was no divorce, he may be thinking of Matthew 1:19–20, according to which Joseph was going to divorce Mary privately until an angel said, "fear not to take your wife Mary," and explained that she had conceived of the Holy Spirit. But this is a very weak formulation of the benefit of sacrament. To be sure, there was *de facto* no divorce, but could they have divorced *de iure*? Moreover, despite Augustine's affirmation that every benefit was fulfilled (*inpletum*), the benefits of fidelity and progeny occurred only in an attenuated form. There was fidelity inasmuch as there was no adultery, but not in the observance of the conjugal debt, and there was progeny inasmuch as they raised Jesus together and inasmuch as both were his true parents, but they did not generate him together.<sup>42</sup>

Augustine was probably unsure of his ground. He had little use for the notion of the union of two in one flesh in his

<sup>39</sup> *De bono coni.* 17, CSEL 41, p. 209.

<sup>40</sup> *De nupt. et conc.* I.13, CSEL 42, p. 225.

<sup>41</sup> *Contra Iulianum* V.12(46), PL 44:810.

<sup>42</sup> Adoption does not satisfy the duty to procreate in rabbinic law.

speculations about marriage, but even if he was inclined to the opinion that marriage was fully indissoluble without coitus, he could not go as far as maintaining that a man and a woman could become one flesh without coitus, and indissolubility seemed to depend on the union in one flesh. The undefined association between the sacrament in marriage and the spiritual union of conjugal charity only obscured the problem, for Augustine was convinced that conjugal charity and sexual intercourse were mutually exclusive.

Augustine states his position vis-à-vis the place of coitus in the formation of marriage in the *Contra Iulianum*, where he argues against Julian's opinion that marriage (*nuptiae*) is nothing else but the mingling of bodies (*corporum commixtio*). He takes the last phrase to mean "sexual intercourse," although Julian was probably referring to that union in one flesh which the Bible treats as the essence of marriage. Be this as it may, Augustine argues that there can be sexual intercourse without marriage (*nuptiae*) and marriage without sexual intercourse. If this were not so, elderly spouses who no longer are able or wish to have sexual intercourse would cease to be married. At this point, Augustine makes a concession:

It would perhaps have been more tolerable if you had said that it [i.e., marriage, *nuptiae*] is not *begun* except through the mingling of bodies, because wives are taken for the sake of procreating children, and children cannot be procreated in any other way.<sup>43</sup>

Augustine clearly recognizes some force in an argument that proceeds from the premise that marriage is for the sake of procreation to the conclusion that coitus is necessary to establish a marriage. He insists nevertheless that sexual intercourse is not integral to the *continuation* of marriage. Marriage does not cease when coitus ceases. Given that a marriage begins in coitus, therefore, one may still argue that an established marriage is in essence a spiritual, non-carnal relationship, and from this point of view the alliance between Mary and Joseph would have possessed and even exemplified the salient characteristics of an established but continent marriage, even if these spouses were not strictly bound to one another. One should note that this discussion, from the *Contra Iulianum*, concerns the definition not of *coniugium* but of *nuptiae*.

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<sup>43</sup> *Contra Iulianum* V.16(62), PL 44:818: "Tolerabilius forte diceret, non eas [nuptias] inchoari nisi per corporum commixtio. . . ."

*Consummation in legal and canonical sources*

In the second century, Athenagoras, explicating Matthew 19:9, says that a man cannot divorce a wife whose virginity he has taken.<sup>44</sup> Was the rule that marriage becomes binding only when it is consummated widely accepted in the early Church? That would seem probable, but the evidence is wanting. Indeed, the rule was not explicitly stated in the Western tradition until the early Middle Ages, and even then only rarely and with some uncertainty.

In AD 528, Justinian ruled that a woman or her parents could repudiate her husband without loss of the dowry if he had proved unable to have intercourse with her for two years after the beginning of the marriage, provided that his problem derived from some natural weakness (*CJ* 5.17.10). He increased the period to three years in AD 536 (*Nov.* 22.6).<sup>45</sup> Since the ground for divorce here was not impotence *per se* but rather the failure to perform the initial act of marital intercourse, the law presupposed the notion of consummation. Divorce on the ground of non-consummation may have passed into Roman from ecclesiastical law, for there is no such law in the Theodosian code, in the *Breviary* or in the *leges*.

Some early medieval canonical sources decree or presume that a marriage may be dissolved on the ground either of non-consummation or of the impossibility of coitus. It is not always easy to distinguish between these two cases. In a rescript to Boniface in AD 726, for example, Pope Gregory II deals with the case of a man whose wife is unable, because of some malady, to fulfil the conjugal debt. It would be preferable, Gregory says, if they were to remain together and practice abstinence, but not everyone is capable of this. If he cannot remain continent, the man may remarry, but he should continue to support his ex-wife, for the problem has arisen through sickness, and not because of any guilt on her part.<sup>46</sup> Unfortunately we do not know the circumstances of this case, and Gregory's response has been variously interpreted both in the Middle Ages and in recent times.<sup>47</sup> The crucial question is whether or not this was a case of non-consummation. If it was a case not

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<sup>44</sup> *Legatio* 33.5, ed. W. R. Schoedel (1972), p. 80 (or *PG* 6:968A). The treatise was written ca. AD 177.

<sup>45</sup> See also *Nov.* 117.12, which confirms this law.

<sup>46</sup> *MGH Epist.* 3 (*Epist. Mer. et Kar. Aevi* 1), p. 276, lines 3–7.

<sup>47</sup> For a virtually exhaustive survey, see William Kelly, *Pope Gregory II on Divorce and Remarriage* (1976).

of non-consummation but of a subsequent cessation of coitus (which seems more likely to this reader), Gregory's response was without parallel in papal jurisdiction and lax by the usual standards of the Western Church.

Even if the case brought before Gregory was one of non-consummation, he wanted the partners to remain together and granted them permission to remarry only as a concession in view of incontinence. William Kelly has suggested that Gregory's normal rule was that a husband should remain continent in a case of this kind, but that this rule could not be applied to the people in question, the Thuringians, because "it would put too great a strain on Christians as yet unaccustomed and untrained to Christian ideals."<sup>48</sup> If what is in question was an unconsummated marriage, Gregory did not consider that such a marriage was simply invalid. Some kind of bond existed between the partners, although it was one that might be broken by way of concession.

Pope Stephen II (752–57), in replying to various questions that had arisen while he was staying at the monastery of Britannacus in Francia, says that if a couple have been joined in marriage, and it happens that one of them is not able to fulfil the conjugal debt, they are nevertheless not permitted to separate. Nor can they separate because of any other malady, unless demonic possession or leprosy has arisen (*supervenerit*). He adds that, if the spouses were free of the aforesaid two maladies when they were joined in marriage, they should continue to care for one another.<sup>49</sup> There are some difficulties of interpretation here, but it is clear enough that Stephen does not permit spouses even to separate, let alone remarry, on the ground of an inability to fulfil the conjugal debt when this inability supervenes upon a valid and established marriage.

Unequivocal references to divorce on the ground of non-consummation in Western canonical sources are surprisingly few and far between. A decree of the Council of Compiègne, which took place under Pepin's auspices in AD 757, presupposes that divorce for non-consummation is permissible. It determines that if a man takes a wife and later, after they have been married for some time, she says that he has not had sexual intercourse with her, but he says that he has, then his word should be taken because the husband is head of the

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<sup>48</sup> *Pope Gregory II on Divorce and Remarriage* (1976), p. 315.

<sup>49</sup> Resp. 2, *PL* 89:1024.

wife (1 Cor. 11:3, Eph. 5:23).<sup>50</sup> The corresponding canon from the Council of Verberie states that if a woman claims that her husband has never had intercourse with her, "they should go thence to a cross [*ad crucem*], and if it is true, they may separate, and she may do as she wishes."<sup>51</sup>

The penitential ascribed to Theodore of Canterbury rules that "if a man and a woman have been joined in matrimony, and later the woman says that the man is unable to have sex with her [*nubere cum ea*], and if someone can prove that this is true, she may marry another man."<sup>52</sup> The ruling is ambiguous, but it almost certainly refers to non-consummation. The same dictum appears in Benedictus Levita<sup>53</sup> and in the penitential of Rabanus Maurus. The latter says that he cannot speak "with authority" on this matter, and attributes the rule to an unnamed collection of statutes (*quorundam statuta*).<sup>54</sup> It seems that the right to divorce on the ground of non-consummation was not entirely certain.

Hincmar cites a conciliar decree on non-consummation in his letter on Stephen's marriage. He attributes the decree to the Council of Leptinnes (AD 743), which took place under Carloman with Boniface attending. In this he may have been mistaken,<sup>55</sup> and he may have been confusing the Council of Leptinnes with that of Compiègne (AD 757).<sup>56</sup> There is a similar rule, as we have noted, in Benedictus Levita.<sup>57</sup> Be this as it may, the decree quoted by Hincmar is as follows:

If a man has betrothed, endowed, and led with public nuptials a woman, but is unable to fulfil the conjugal debt that he owes to her according to the Apostle, and if this is made evident

<sup>50</sup> *Decretum Compendiense* 20, *MGH Capit.* 1, p. 39.

<sup>51</sup> *Decretum Vermeriense* (753/756?) 17, *MGH Capit.* 1, p. 41. On the possible date, see Hefele-Leclercq, vol. 3.2, p. 917. It has been suggested that the so-called canons of Verberie really comprise a draft composed by a cleric in preparation for the Council of Compiègne: see J. Gaudemet, *Sociétés et mariage* (1980), p. 262.

<sup>52</sup> *Penitential* II.12.33, ed. Finsterwalder, *Die Canones Theodori Cantuariensis* (1929), p. 330 (or Haddan and Stubbs, p. 201). Cf. *Concilium lifinense* (AD 743), *MGH Conc.* 2, p. 5 (canon as reported by Hincmar in *Epist.* 136, *MGH Epist.* 8, p. 97), where much the same ruling is given.

<sup>53</sup> Ben. Lev. II.55, and II.91 (*PL* 97:757 and 760).

<sup>54</sup> *Poenitentiale* (= *Epist. ad Heribaldum episcopum Antissiodorensem*) 29, *PL* 110:491A. The penitential was composed ca. 853.

<sup>55</sup> See *MGH Conc.* 2, pp. 5–6; and Hefele-Leclercq, vol. 3.2, p. 834, n. 1.  
<sup>56</sup> Cf. *Decretum Compendiense* 20, *MGH Capit.* 1, p. 39; and *Decretum Vermeriense* (753/756?) 17, *MGH Capit.* 1, p. 41.

<sup>57</sup> Ben. Lev. II.91, *PL* 97:760. See also II.55, *PL* 97:757.



either by the confession of both partners or can be proven in some way, they should separate, and the woman, if she is unable to remain continent, may legally marry another man.<sup>58</sup>

Here the dissolution of the marriage is not only licit (as in the other rulings considered above) but obligatory.

A council held at Tribur in AD 895 considered the case of a man who had married a woman legitimately (*legitimam duxerit uxorem*) but had been unable, because of some "domestic infirmity," to have sexual intercourse with her. Meanwhile, his brother had had sex with the woman without the man's knowledge. It was determined that they must separate, and that both men must keep away from the woman. The marriage, which had been legitimate and licit, had been made illicit by the woman's violation. The ex-spouses should ideally remain continent, but in view of their infirmity they were to be permitted to remarry, if they were unable to remain continent, after the appropriate penance had been done.<sup>59</sup> This ruling is very precise. The marriage in question was apparently not consummated, but it was nevertheless considered to be valid (*legitimum*). Supervenient incest had made it illegitimate, and for this reason the spouses had to separate. It is unlikely that remarriage would have been permitted if the marriage had been consummated before the incest occurred.

This decree may be instructively compared with the corresponding text in a source that seems to have been a draft for the proceedings at Tribur:

A certain man betrothed a woman and gave her a dowry [*desponsavit uxorem et dotavit*], but was unable to have intercourse with her. His brother secretly corrupted her and made her pregnant. It is decreed that although she was not able to be married to her legitimate husband [*nupta esse non potuerit legitimo viro*], the man's brother may not have the betrothed woman [*desponsata*]. The adulterer and the adulteress should suffer the penalty for fornication, but they should not be prevented from forming legitimate marriages.<sup>60</sup>

The facts and the judgment are the same, but the usage and the conceptual apparatus are different. Whereas in the text from the council itself, the man is said to have "led" (that is, married) the woman, here he is said to have betrothed her and

<sup>58</sup> *Epist.* 136, *MGH Epist.* 8, p. 97.

<sup>59</sup> *Conc. Triburiense* (AD 895) 41, *MGH Capit.* 2, p. 237.

<sup>60</sup> *Iudicia Conc. Tribur.* 5, *ibid.*, p. 207.

given her a dowry. Because he could not consummate the marriage, she was not his *nupta*. The betrothal, once it had been confirmed by dotation, was sufficient to establish the validity of the relationship, and no further formalities were needed, but the marriage would have been consummated (that is, it would have become *nuptiae*) by means of sexual intercourse. Since this had not taken place, the woman was still the man's *desponsata*, although he had probably already "led" her (that is, brought her to his home). Although the woman was not her husband's *nupta*, the relationship was such that the brother's intercourse with her was in some way incestuous.

While on the one hand the unconsummated marriage should be dissolved, leaving the partners free to remarry, on the other hand the brother could not marry the woman. The ruling contradicts the presumption that the brother could marry the woman because her marriage was unconsummated. (Since she was carrying the brother's child, there were good practical reasons for her marrying him.) In this respect the ruling is comparable to that issued by the emperor Zeno in AD 475 against those who consider that a man may marry the wife (*coniux*) of a brother who has died provided that she has remained a virgin. Such persons suppose that marriage (*nuptiae*) is not really contracted until the partners have been carnally united ("cum corpore non convenerint, nuptias re non videri contractas"). Zeno determines that marriages formed in this way are illegitimate.<sup>61</sup>

The role of consummation in the Germanic traditions is unclear. According to an entrenched scholarly tradition, coitus was central to the Germanic conception of marriage in the early Middle Ages, and no marriage was binding without consummation. Scholars have regarded this as one of the chief differences between Roman and Germanic matrimonial law.<sup>62</sup> Unfortunately, there is little direct evidence for the thesis. Even if one presumes that consummation, in the form of the traditional *bilage*, was an important part of Germanic customary ritual in the early Middle Ages<sup>63</sup> (which is very plausible but pure speculation), it does not follow that consummation was

<sup>61</sup> *CJ* 5.5.8.

<sup>62</sup> See for example James Brundage, *Law, Sex and Christian Society in Medieval Europe* (1987), pp. 130, 135 and 144.

<sup>63</sup> Cf. C. Gellinek, "Marriage by consent in literary sources of medieval Germany," *Studia Gratiana* 12 (1967), p. 559, where the *bilage* is posited as the normal conclusion to the process of getting married.

necessary in law for the perfection of marriage. Similar customs were observed in Roman society, where consummation had no legal significance.<sup>64</sup> It is true that in the *Grágás*, a vernacular Icelandic code compiled in the twelfth and thirteenth centuries, a marriage was formally concluded when the groom was led with lights to his wife's bed. Unless husband and wife were observed to go to bed together by at least six witnesses, the marriage was not valid.<sup>65</sup> But there is little if any indication in the Latin codes that consummation was legally necessary for the perfection of marriage or even that it had any legal significance.

The morning gift was probably originally associated with the husband's taking of his bride's virginity, but if so it had lost much of this significance by the time the *leges* were prepared. In some tribes, such as the Visigoths, the morning gift as something distinct from the dowry (*dos*) had fallen into desuetude when the codes were compiled. Even among those, such as the Lombards, who still conferred the morning gift, it was simply an additional amount that the man gave to his wife at the time of their marriage.

Perhaps the dowry was normally conditional upon consummation. Hincmar speaks of Stephen of Auvergne's spouse retaining the dowry that she *would* have gained *if* sexual union had taken place.<sup>66</sup> The marriage in question (which Hincmar considered invalid on the ground of prevenient affinity) was unconsummated. Stephen had apparently already given her the dowry.

While divorce on the ground of non-consummation may have been recognized in early medieval civil law (although the evidence for this is wanting), the conjugal debt was a peculiarly Christian institution. When Stephen of Auvergne's scruples caused him to refuse to consummate his marriage even though all the formalities, including the nuptials, had been concluded, his father-in-law, Count Raymond of Toulouse, brought the case to the Council of Tusey in 860. The count wanted to

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<sup>64</sup> See S. Treggiari, *Roman Marriage* (1991), p. 54.

<sup>65</sup> See R. Frank, "Marriage in twelfth- and thirteenth-century Iceland," *Viator* 4 (1973), p. 475; and J. M. Jochens, "The Church and sexuality in medieval Iceland," *Journal of Medieval History* 6 (1980), p. 380.

<sup>66</sup> *Epist.* 136, *MGH Epist.* 8 (*Epist. Kar. Aevi* 1), p. 98: "et ipsa puella post desponsalia dotem acceptam, quam de se ipsa, si carnaliter iungerentur, mercari debuerat, ut eandem dotem habere non debeat, non ipsa, sed Stephanus, ut videtur, commisit. . . ."

force Stephen to consummate the marriage. As Pierre Daudet has pointed out, this suggests that there was no means in civil law to urge a husband to consummate his marriage, and that the Church might at least have been expected to act in this way.<sup>67</sup> The law of the Church, and not that of the State, emphasized the role of consummation and the conjugal debt. Divorce on the ground of non-consummation in ecclesiastical law should perhaps be attributed not to Roman or to Germanic influence but to a peculiarly Christian tradition that had roots in Judaism.

The evidence of early medieval canonical sources regarding divorce on the ground of non-consummation leads to the following two conclusions. First, the principle that non-consummation was a valid ground for divorce and remarriage was familiar but not entirely certain and established. Thus Rabanus Maurus admits that he cannot pronounce with authority on the subject. Second, the status of a marriage that could not be consummated remained undetermined, and opinions varied. Gregory II (if this was a case of non-consummation) permitted divorce and remarriage but preferred the spouses to stay together and to practice continence. The supposed decree of Leptinnes determined that the spouses *had to* divorce. Several sources *permitted* the wife of an impotent husband to leave him and remarry. The Council of Tribur regarded the marriage in question as legitimate but of such a nature that supervenient affinity made it null.

That such uncertainties and differences of opinion existed is not surprising, for the Fathers had bequeathed an ambivalent tradition. On the one hand, churchmen were mindful that marriage was a union made by God, that coitus was vile, that Mary and Joseph had never consummated their marriage, and that continence could be profitably practiced within marriage, and this without detriment to the marital affection of the spouses. They reasoned that even a couple who separated by mutual consent to live in different monasteries remained true to their marriage. On the other hand, marriage was the union of two in one flesh. It seemed from the latter point of view that coitus completed the marriage bond and made it indissoluble. My own reading of the evidence is that there was considerable uncertainty about precisely when and how the marriage bond became fully formed. The notion that God joined husband and

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<sup>67</sup> P. Daudet, *Études sur l'histoire de la juridiction matrimoniale. Les origines carolingiennes de la compétence exclusive de l'Église* (1933), p. 125.

wife made the issue even more complicated, especially for those who, like Hincmar of Reims, attached considerable importance to the nuptial benediction. Hincmar was the only author (as far as we know) before the twelfth century who tried to make sense of all this and to formulate a model of the nuptial process that included agreement, benediction and coitus.

*Hincmar and consummation*

Hincmar of Reims was also the first to attempt to define the function of coitus in the formation of marriage.<sup>68</sup> In Hincmar's view, a man and woman become "ordained" to marriage as soon as they are betrothed. The betrothed person is less than married but more than single. Betrothal is a solemn and binding obligation between the partners, and although a prior betrothal does not in itself invalidate marriage to a third party, the Church has sanctioned the secular penalties for breaking a betrothal.<sup>69</sup> A betrothed woman is morally as good as married. In his treatise on abduction, Hincmar points out that some passages of Scripture (i.e. Deut. 22:23 ff., Hosea 4:14 and Matt. 1:20) refer to *desponsatae* as wives or say that they have committed adultery. This implies that betrothal ought to be regarded as holy and inviolable:

... the law of God intends the compact and bond of marriage, once it has been initiated [*initiatum*] with parental consent and by petition in accordance with the law [*parentali auctoritate et legitima postulatione*], to be so holy and inviolable, even before nuptial union, that it treats a man's betrothed [*desponsata*] as his wife [*uxor*]. . . .<sup>70</sup>

If betrothal initiates marriage, sexual intercourse brings about the end and completion of the process. It is then that the sacrament of Christ and the Church, or the nuptial mystery, becomes complete. Although Hincmar derives his notion of the sacrament in marriage from Augustine, he places a much greater emphasis than his predecessor did on the notion of

<sup>68</sup> On Hincmar's involvement in matrimonial scandals and litigation, see: P. Daudet, *Études* (1933), pp. 89–150 (esp. pp. 122–34, on the case of Stephen of Auvergne); J. Devisse, *Hincmar, Archevêque de Reims*, vol. 1 (1975), pp. 369–466; and J. Bishop, "Bishops as marital advisors in the ninth century," in J. Kirshner S. F. Wemple (eds), *Women of the Medieval World* (1985), 53–84 (*passim*).

<sup>69</sup> *Epist.* 136, p. 98, lines 7–15.

<sup>70</sup> Hincmar, *De coercendo et extirpando raptu* 6, *PL* 125:1021. Hincmar's interpretation of Matthew 1:20 here is not the same as that in *Epist.* 136.

marriage as a union in one flesh. Even when Hincmar follows Augustine in comparing marriage to baptism, his treatment is unlike Augustine's in its emphasis on incorporation. Following Gregory, he supposes that husband and wife are parts of one body.<sup>71</sup> This aspect of his thought is entirely concrete, and he offers no theory about what it is to be two in one flesh. Husband and wife are simply and really one body.

The case of Stephen of Auvergne's marriage caused Hincmar to think deeply about the place of sexual union and consummation in marriage. The main events of the case were as follows.<sup>72</sup>

With the consent of his kinsfolk, Stephen had asked the girl's father for her hand in marriage and had betrothed her in accordance with the law. Stephen was then unwilling to conclude the marriage and went into exile to escape the wrath of the girl's father, Count Raymond of Toulouse. Stephen's scruples were due to the fact that he had had sexual intercourse with a near relative of his bride before their marriage. (We do not know what the relationship was.) Having been forced to return by Raymond, and to conclude the arrangements, he gave her a dowry and accepted her with public nuptials ("dotavi eam, et publicis nuptiis honoratam accepi"), but he then refused to consummate the marriage. It was at this stage that the girl's father brought the case before the Council of Tusey.

Stephen declared to the council his willingness to obey the bishops' decisions. He was ready to do whatever was necessary for the appeasement in this life (*secundum saeculum*) of Count Raymond, for his own eternal salvation, and for the salvation and honour of his wife.<sup>73</sup> The issue was vexed, and the bishops consulted Hincmar, Archbishop of Reims, a man who was both erudite and powerful. Some of the problems pertained to matters of judicial procedure and competence, but the status of Stephen's marriage, if it really was a marriage, was also in question. The uncertainty of the bishops about this case (which would have been straightforward in high medieval canon law) should be emphasized. In attempting to provide a definitive solution to the problem, Hincmar was sailing in uncharted

<sup>71</sup> See *De divortio*, PL 125, 645A-B; *Epist.* 135, MGH *Epist.* 8, p. 83, lines 11-13; *Epist.* 136, MGH *Epist.* 8, p. 94, lines 4-17.

<sup>72</sup> What follows is from Stephen's deposition to the Council of Tusey (near Toul) in AD 860, as reported by Hincmar, *Epist.* 136, MGH *Epist.* 8 (*Epist. Kar. Aevi* 6), p. 89.

<sup>73</sup> Hincmar, *Epist.* 136, p. 90, lines 2-5.

waters. His letter of reply took the form of a speculative treatise.<sup>74</sup> Although it is tortuous, rambling and often obscure (for its author was a poor writer), it was the result of much learning and reflection.

After recounting the facts of the case and discussing some of the procedural and judicial problems, Hincmar turns to consider the nature of marriage as a union in one flesh. A cursory reading of this part of his treatment might lead the reader to conclude that in Hincmar's view Stephen's marriage is dissoluble because it is unconsummated, but this is by no means what Hincmar intends to prove. First, he accepts that sexual intercourse between Stephen and his wife would have been incestuous. Were they to have had coitus, in his view, they would not have consummated a marriage but rather would have entered a condition of turpitude (an "anti-marriage," as it were). Their marriage was invalid for this reason. Second, Hincmar maintains that a marriage becomes indissoluble, other things being equal, once benediction has taken place, and thus even before consummation (which normally comes later).

Hincmar says that there is a fully established, valid marriage when a man is joined to a woman with whom the due formalities have been completed: namely, petition, betrothal, dotation and public nuptials. (He is joined to a woman who is "a parentibus . . . petita et legaliter desponsata, dotata et publicis nuptiis honorata.") He also says that husband and wife are joined in such a way that they become one flesh or one body. Furthermore, no man may separate what God has joined together (92.27–31).

These are the basic facts of the matter. What do they mean? Here Hincmar appeals to Leo's response to Rusticus regarding the man who was to marry despite having had a concubine. Pope Leo said:

Since the nuptial compact [*societas nuptiarum*] was instituted from the beginning so that, besides sexual union [*praeter sexuum coniunctionem*], it should contain a sacrament of Christ and the Church, there is no doubt that a woman in whom it is proved that there has been no nuptial mystery does not attain to matrimony.<sup>75</sup>

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<sup>74</sup> I.e. *Epist.* 136, *MGH Epist.* 8 (*Epist. Kar. Aevi* 6), pp. 87–107. In the following discussion, references in parentheses indicate the page- and line-numbers of this edition.

<sup>75</sup> Leo, *Epist.* 167, inquis. IV, *PL* 54:1204–1205. Quoted by Hincmar at 93.1–3.

It follows from this, Hincmar argues, that marital union involves sexual intercourse. His idea seems to be that in Leo's view sexual union in marriage carries with it the sacrament or mystery pertaining to Christ's union with the Church. Hincmar supports his interpretation in the following way:

Marriage does not contain the sacrament of Christ and the Church, as blessed Augustine says, unless [the spouses] have used each other nuptially: that is, unless it has been followed by sexual intercourse [*commixtio sexuum*]. Nor can a woman with whom it is found that sexual intercourse [*commixtio sexuum*] has not taken place attain to matrimony, just as [according to Leo] there is no doubt that the woman with whom it is proved that there has been no nuptial mystery does not attain to matrimony. (93.6–10)

Hincmar's source for the opinion he ascribes to Augustine is unknown. The opinion is entirely alien to Augustine's theory of marriage, although Hincmar found his conception of the function of consummation (surprisingly enough) in Augustine. He reasoned that sexual intercourse completed the sacrament about which Augustine had written.

These arguments lead Hincmar to the following conclusion:

the true union of legitimate marriage [*vera legitimi coniugii copula*] occurs when, between free persons of equal rank, and with paternal consent, a free woman who has been legitimately endowed and honoured by public nuptials is joined to a man by sexual intercourse. It is then that marriage contains the sacrament of Christ and the Church and that the woman, in whom it is proved that there has been both sexual union and the nuptial mystery, is known to attain to matrimony. (93.16–20)

At this point Hincmar quotes Ephesians 5:28–32 ("He who loves his wife loves himself," etc.).

Regarding the case under consideration, Hincmar notes that Stephen concluded the marriage with the wrong motives. Since he was under duress, he acted not out of the desire for progeny but in order to evade exile or even death. Moreover, instead of striving for fidelity, by which he would have preserved conjugal chastity, he had to avoid the dire consequences of incest. As to the third of Augustine's benefits, the sacrament: Stephen's marriage could never contain the "sacrament of incorporation in the unity of Christ and the Church" because it could never be consummated. Although the marriage was between free persons of equal status, and although it had been celebrated after betrothal and dotation and with paternal con-



sent, it could not ever have become the "legitimate union of marriage," nor could it ever have become established (*ratum*) and fixed. For if coitus had taken place, they would have committed incest, and they could not have satisfied for this crime by penance without separating permanently. Moreover, an incestuous union, since it deserves penance, cannot contain the sacrament of Christ and the Church (95.15–27).

Hincmar concludes that their marriage was "neither mystical nor legal in the eyes of God." If coitus had taken place, there would have been sexual union of a kind, and they would have become one flesh. For according to Paul, even a man who has intercourse with a prostitute becomes one flesh with her (1 Cor. 6:16). But they would not have become married. Instead of the "nuptial good," there would have been "incestuous evil" (95.27–34). Since their marriage was illegally joined, they must be separated both in the eyes of God and in eyes of men, lest the crime of incest should be added to their simulated marriage (96.22–25).

Hincmar finds further support for his thesis in the decree that he ascribes to the Council of Leptinnes (AD 743):

If a man has betrothed, endowed, and led with public nuptials a woman, but is unable to fulfil the conjugal debt that he owes to her according to the Apostle, and this is made evident either by the confession of both partners or can be proven in some way, they should separate, and the woman, if she is unable to remain continent, may legally marry another man.

In Hincmar's view, the decree is in accordance with the teaching of Leo, who said that the woman in whom the sacrament of Christ and Church, which is the nuptial mystery, has not been formed by means of sexual union does not attain to matrimony (97.4–12).

If separation and remarriage are licit when "impotence of the flesh" prevents sexual union, how much more are they licit when "reverence of the mind" prevents sexual union, as in the case in hand. But once betrothal, dotation, and the sacrament of marriage [*nuptiarum sacramentum*]<sup>1</sup>—that is, the union of their bodies—have taken place, then the mystery of Christ and the Church has occurred, and a conjugal union exists that cannot be dissolved except by death (97.13–18).

In Hincmar's view, the marriage in question should be dissolved and the girl should be returned to her father. With her father's consent she may then be married "to whom she wishes, only in the Lord" (1 Cor. 7:39). No compensation is

strictly due, but Hincmar counsels that Count Raymond's daughter should keep the dowry in lieu of the compensation that civil law, with the Church's support, prescribes as the penalty for breaking a betrothal. For although the dowry is conditional upon consummation, she has already received it. This ought to be sufficient to put to rest the enmity between Raymond's family and Stephen (98.7–15).

Stephen too may marry another woman if he is unable to remain continent, but only after he has done penance for his pre-marital fornication. He may then be reconciled with the Church, some of whose members he has regrettably scandalized. His refusal to add the crime of incest to that of fornication is commendable (105.24–106.6).

Hincmar emphasizes that although the nuptials have been celebrated and the girl may keep the dowry, this in no way implies that Stephen and the girl are man and wife. Their union is false (98.16–33). Indeed, had Stephen died while they were still apparently married, she would have been able to marry his brother (99.29–32). (Hincmar assumes that this would not have been controversial.) For the supposed marriage, lacking as it does both sexual union and the hope of progeny, does not contain the "sacrament of faith."

Hincmar compares this sacrament of faith, by which a husband and wife become one flesh, to that of baptism, which incorporates each believer into the Church, the body of Christ (99.34–100.2). Just as the sacrament of baptism never ceases to exist once it has been conferred, so the marriage bond (*vinculum coniugale*) is indissoluble once it has been "legally and nuptially celebrated." A couple may separate on the ground of fornication, but they may be united again after the appropriate penance, and in that case the marriage bond would not have to be created anew. Penance is necessary because the sinner must be reconciled with the Church before being reconciled with his or her spouse. The adulterer is "first reinstated in the sacrament of the Church, and afterwards in the nuptial mystery" (101.32–102.10). In Hincmar's view, the sacrament in marriage is both analogous and subordinate to the sacrament of faith by which the members of the Church are united to Christ.

Although Hincmar maintains that the nuptial mystery is a form of corporeal or sexual union, this does not in his view entail that marriage remains dissoluble until it is consummated. It is this aspect of his treatment that makes his thesis difficult to grasp and his expression of it not entirely coherent. He

considers the case of St John, whom (according to a story recorded by Bede) Jesus summoned as a disciple while his wedding was in progress. Jesus did not call John away after the nuptials but during the nuptials and before consummation, for he came to fulfil the law and not to destroy it. Although we do not know whether John's *sponsa* remained continent or married another man, it can be said that if the nuptials had been completed—in other words, if John had led in public nuptials a woman whom he had betrothed and endowed—she would not have been able to marry another man *even if they had not yet consummated their marriage*. John and his bride could only have separated then by a mutual vow of continence (102.19–29). Likewise Stephen, having betrothed, endowed and honoured with public nuptials Count Raymond's daughter, even though the marriage was not consummated, would not have been able to leave her and marry another, regardless of whatever penance he might do, were it not for the fact that their sexual union would have been incestuous (102.29–38).

Hincmar found further confirmation for this theory in Matthew's account of Mary and Joseph's marriage. Joseph found Mary to be with child "before they came together" (Matt. 1:18). Whereas Jerome took this to mean "before they began to have a sexual relationship,"<sup>76</sup> in Hincmar's view it means "before they celebrated their nuptials" ("antequam nuptiarum solemnia celebrarent"). For whereas Jerome used the word *nuptiae* to denote marriage after sexual union, in Hincmar it denotes the nuptials. The term "coming together," he explains, does not denote sexual intercourse itself but rather the nuptials (*nuptiae*), which normally precede sexual intercourse. It is at this time (in other words, when the woman is led with public nuptials) that she ceases to be a *desponsata* and becomes a wife (*coniux*).

Hincmar's reason for interpreting the passage in this way is that Joseph was at first inclined privately to divorce Mary (Matt. 1:19). Joseph surely did not suspect her of adultery. He must have known that no other man had touched her, but he was inclined, as a just and honorable man, to release his *sponsa* from the betrothal. Realizing that she needed protection from false accusations, however, and even from being stoned as an adulteress, he accepted her as his wife (Matt. 1:24). The nuptials took place, but both spouses remained continent. This

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<sup>76</sup> Cf. Jerome, *Adv. Helvidium* 4, PL 23:196A.

was what the angel was advising Joseph to do when he said, "fear not to take Mary your wife" (Matt. 1:20). And Siricius is referring to a marriage of this kind—that is, a marriage that has been confirmed by nuptials but remains unconsummated—in his response to Himerius of Tarragona (102.39–103.23). Between such spouses, who are married (*nuptiati*) but still unmarried (*innupti*), the mystery of Christ and the Church is directed to its completion but is not yet fully complete: "Christi atque ecclesiae mysterium ad completionis perfectionem dirigitur, sed non carnis unione completur" (103.29–32).

Hincmar does not maintain simply that unconsummated marriage is dissoluble. Rather, his view is that the nuptials make marriage indissoluble, but that since marriage is oriented or ordered to sexual consummation, marriage is dissoluble, and indeed invalid, if consummation is impossible. In that case it is not ordained to the union in one flesh and the "sacrament" can never be formed, for the union in one flesh completes the mystery or sacrament of Christ and the Church. Such is obviously the case when a husband proves to be impotent, but it is equally the case when coitus would not perfect the mystery of Christ and the Church but rather would create an incestuous union. Stephen's marriage should be dissolved (or rather annulled) not because it is unconsummated but because it is "unconsummable."

Hincmar's argument, therefore, is as follows. First, the relationship between Stephen and his bride could never become a consummated marriage because in their case coitus would be incestuous. Second, the marriage itself is invalid for this reason, and the partners are free to remarry. One may ask why Hincmar's argument followed this indirect course. If the girl with whom Stephen had had sexual intercourse was indeed related to his wife within the forbidden degrees (as Hincmar assumed), then the relationship of affinity should have precluded the formation of the marriage in ecclesiastical law. It seems that Stephen and his bride had found themselves in a kind of limbo or no-man's-land, such that they were bound to one another but could not validly consummate their marriage. Hincmar's argument was that because the marriage could not be validly consummated, it was invalid and did not bind the spouses.

Hincmar's theory regarding the place of sexual union in marriage is a difficult one, and it is not without points of tension, for he wished to maintain both that marriage was fully

established by sexual union and that it became indissoluble once the nuptials were complete. I suspect that the thesis arose from two convictions, which were not easy to square with one another. The first was the belief that marriage involved coitus because it was a bodily union, a union in one flesh. The second was the belief that priestly benediction was a vital part of the nuptial process, and the moment at which God joined the spouses in a union that no man could separate. Hincmar argued elsewhere that, when a couple separated by mutual agreement to serve God, they did not separate in respect of the union formed by God, but merely in respect of their carnal relationship.<sup>77</sup>

Hincmar could not entirely distinguish the God-created union from the union in one flesh, for he identified the latter with the sacrament or mystery in marriage. How could he get around this problem? Only by maintaining that once the nuptial process had passed the point of benediction, the sacrament, while still incomplete, was directed or ordained to its completion. This was an application of the idea that becoming married was a process of realization or fulfilment. Whether it makes sense is another matter. When does an egg become a chicken? When does a potentially human life become a potential human life, or a potential human life become a human life? A moment's reflection will reveal that finding answers to such questions is not always easy, especially when important moral and practical decisions depend upon them and when the answers may have painful consequences.

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<sup>77</sup> *De divortio*, PL 125:642C: "Separat autem Deus, non a maritali et uxorea secundum Deum inita conjunctione, sed a carnali commercio et uxorei usus commistione."

## CHAPTER SIXTEEN

### BENEDICTION

The central element of the nuptial liturgy was a priest's blessing of the bride or of the couple. Closely associated with this blessing (*benedictio*) were two other acts that the priest performed: veiling (*velatio*) and joining (*dexterarum iunctio*). In the former, the priest placed a veil over the bride or over the couple. In the latter, the priest joined the right hands of the bride and groom. What were the sources of these rites? and what was their significance?

#### *The original blessing*

Both nuptial benediction and nuptial joining commemorate or re-enact things that God did in the beginning. Joining re-enacts God's bringing of Eve to Adam in Genesis 2:22. Benediction re-enacts the original blessing of Genesis 1:28: "So God created man in his own image . . . male and female he created them. And God blessed them, and God said to them, 'Increase and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth'." God commanded humankind alone to subdue the earth, but he also blessed the fish and the birds and commanded them to increase and multiply (Gen. 1:22). After the flood, God renewed his benediction by blessing Noah and his sons, commanding them to increase and multiply and reminding them that he had made humankind in his own image (Gen. 9:1, 6–7).

Clearly, the Bible associates God's blessing with the procreation of children. Some texts even identify the two things. God said to Abraham, "I will indeed bless you, and I will multiply your descendants as the stars of heaven and as the sand that is on the seashore" (Gen. 22:17). Rebekah's family betrothed her to Isaac with the blessing, "be the mother of thousands of ten thousands" (Gen. 24:60). Rebekah proved to be barren, but Isaac prayed to the Lord and she conceived (25:21). The Psalmist sings, "Lo, sons are a heritage from the Lord, the fruit of the womb a reward. Like arrows in the hand of a warrior are the sons of one's youth. Happy is the man who has his quiver full

of them" (Ps. 126/127:3–5). And again, "Your wife will be like a fruitful vine within your house; your children will be like olive shoots around your table. Lo, thus will the man be blessed who fears the Lord" (Ps. 127/128:3–4).

Scripture suggests that God's blessing of marriage is either the gift of children *per se* or the good favour that procreation finds in God's eyes. This is what the Latin Fathers usually have in mind when they refer to the benediction of marriage. For example, Augustine cites Genesis 1:28 in Book IX of the *De Genesi ad litteram*, when he inquires as to what help God intended Eve to give Adam. The text shows, Augustine argues, that she was to provide Adam with the means of procreation. After quoting the text he adds: "this reason for the creation and joining of man and woman and also [this] benediction did not cease to have effect after the sin and punishment of man."<sup>1</sup> In other words, sexual procreation continued to be one of the three "goods" of marriage. The construction of the Latin sentence suggests that the reason and the benediction are one and the same, for the verb is singular in number ("quae ratio . . . atque benedictio nec . . . defecit").

In the *De nuptiis et concupiscentia*, Augustine identifies the benediction with God's command to multiply. Here procreation says of itself, as one of the three benefits of marriage (i.e. the *bonum prolis*), that it would have been happier in Paradise, where there was no sin, because "that benediction of God—'increase and multiply'—pertains to me."<sup>2</sup>

Whatever the precise semantics of *benedictio* in Augustine's usage may be, the central idea is clear enough. God's blessing of Adam and Eve was the expression of his approval of sexual procreation. In Latin, as in Greek, to bless something (*benedicere*) is literally to speak well of it. Just as God sees that each phase of his creation is good, so he approves of the mode of procreation that he has established for all animals, including humankind. It is striking that Augustine did not associate the blessing with any liturgical act. Priestly benediction, as far as we can see, did not spring to his mind in this context, and it had no place in his theorizing about the holiness of marriage.

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<sup>1</sup> *De Gen. ad litt.* IX.3, CSEL 28.1, p. 271: "Quae ratio conditionis et coniunctionis masculi et feminae atque benedictio nec post peccatum hominis poenamque defecit."

<sup>2</sup> *De nuptiis et concupiscentia* I.23, CSEL 42, p. 236: "ad me namque pertinet illa benedictio dei: crescite et multiplicamini."

In his *Quaestiones veteris et novi testamenti*, Ambrosiaster anticipates by some twenty years Augustine's acknowledgment that God intended sexual procreation to take place in Paradise.<sup>3</sup> He aims to show that man is integral to the world in which he finds himself. All things were made for the sake of man and man's way of procreating is the same as that of all animals. This way is good because God intended it from the first. Man's animal method of procreating is not a consequence of the Fall. Ambrosiaster emphasizes that God gave the same blessing to humankind that he had given to the irrational animals of the sea and of the air (Gen. 1:22). Indeed, he quotes Genesis 1:22 rather than 1:28 as the Scriptural witness to the blessing, adding that "mankind was also blessed in a similar way." Even while emphasizing that God gave the same blessing to both irrational and rational animals, Ambrosiaster sees in the blessing given to man a pious restraint by virtue of which one may better serve God:

For by this benediction those things were blessed that were created for the sake of man [i.e. the irrational animals], and by that benediction also man was blessed, so that in a similar way, from male and female, the progeny of mankind should increase and multiply over the earth; and so that, just as seed is improved through cultivation, so also humankind should take care and strive to achieve this end: that having attained knowledge of its creator it should control [*frenaret*] its life to make itself worthy of him, in order that all things should advance for the praise and glory of the Creator.<sup>4</sup>

Ambrosiaster argues that because God has blessed sexual procreation, to curse it is heresy.<sup>5</sup> That marriage is good is a straightforward and simple matter.<sup>6</sup> Like Augustine, he sees in the original blessing an expression of God's good favour toward sexual procreation.

*The nuptial blessing as a re-enactment of the original blessing*

Unlike Augustine, Ambrosiaster related God's benediction in Genesis to nuptial benediction in the Church. He explains that the evidence of nature corroborates that of Genesis, for

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<sup>3</sup> See D. H. Hunter, "On the sin of Adam and Eve: a little-known defense of marriage and childbearing by Ambrosiaster," *Harvard Theological Review* 82 (1989), 283-99.

<sup>4</sup> *Quaest.* 127.2, CSEL 50, pp. 399-400.

<sup>5</sup> *Ibid.*, 6, pp. 400-01.

<sup>6</sup> *Ibid.*, 14, p. 405: "est enim res aperta et simplex."



the various genera would not have continued to multiply and improve without God's benediction and favour. Nor, he argues, could they have increased by any other way than that "decreed to the seed by God's will and benediction." This doctrine is conveyed by the practice of nuptial benediction, which re-enacts and commemorates what God did in the beginning:

The tradition of this matter continues in the Synagogue and is now celebrated in the Church, so that God's creature is joined under God's benediction. There is no presumption here because the [liturgical] form was given in this way by the author himself [i.e. God].<sup>7</sup>

The same notion that the nuptial blessing re-enacts the original blessing is presupposed in Ambrosiaster's commentaries on Paul. In regard to Paul's opinion that the widow, while free to remarry, will be happier if she remains single, Ambrosiaster comments:

When he says "let her marry," he is speaking with regard to the natural law, although while the first marriage is from God the second is [merely] permitted. Accordingly the first marriage is celebrated in heaven [*sublimiter*], but the second lacks glory even in these times [*in praesenti*].<sup>8</sup>

Commenting upon 1 Timothy 3:12–13, Ambrosiaster says that "God has decreed that a man should have one wife, with whom he is blessed, for no-one is blessed with a second."<sup>9</sup> These texts suggest that the Roman practice of refusing benediction to second marriages was already established in Ambrosiaster's time, but in fact they refer only obliquely to the liturgy. His point is that first marriages have God's blessing while second marriages do not. Similarly, only the first of all marriages, that of Adam and Eve, took place in Paradise in the presence of God. Uniquely, God himself officiated at this wedding and, as it were, personally blessed the couple.

Isidore, like Ambrosiaster, reasoned that God himself initiated the liturgical form of benediction in the beginning:

When God created humankind, he determined that those who join in marriage should be blessed by a priest. For it is written, "And God made man, in the image of God he created him, male and female he created them, saying: increase and multiply."

<sup>7</sup> *Ibid.*, 3, p. 400.

<sup>8</sup> *Ad Corinthios prima* 7:40, CSEL 81.2, p. 90.

<sup>9</sup> CSEL 81.3, p. 268.

In like manner, what was done then in Paradise is done now in the Church.<sup>10</sup>

The nuptial veil, Isidore explains, is called the *vitta* (as distinct from the *mafors* that the bride wore to the wedding to signify her subordination to the groom). The *vitta* is coloured white and red, white to signify chastity and red to signify sexual procreation. Again, since Paul, in 1 Corinthians 7:5, said that couples may abstain for a while for the sake of prayer but should then return to their conjugal relations, the white parts of the veil signify abstinence while the red parts signify the satisfaction of conjugal rights.<sup>11</sup>

According to Hincmar of Reims, God joined Adam and Eve in marriage by blessing them, and we commemorate this original blessing in the nuptial mass:

... at the beginning of the world, God made a man and a woman for the propagation of humankind, and he joined them with his blessing, saying, "Increase and multiply." The holy Church also, in imitation of what God did, has from ancient times protected solemnly and with reverence those who were joined in marriage in the Church, as if they were in God's Paradise, joining them by the divine benediction and by the celebration of mass.<sup>12</sup>

#### *Particular blessing*

Granted that God blessed marriage in the beginning and that the priest commemorates this in the nuptial mass, do we suppose that God blesses individual marriages, or merely that in blessing the first marriage, God blessed the institution? A similar question may be asked in regard to nuptial joining: does God join each husband to each wife?

The notion that God intervenes by marrying each husband to each wife occurs only rarely in patristic and medieval sources. God's blessing of Christian marriages seemed for the most part to be a generic blessing of the institution. What is in question here is the meaning of Jesus' statement that what God has joined man should not separate (Matt. 19:6 etc.).

The logic of generic blessing is manifest in a passage in Ambrose's commentary on Luke. Here Ambrose asks why St Paul counsels, "if the unbelieving partner would separate, let him separate" (1 Cor. 7:15). If all marriage comes from God, and

<sup>10</sup> Isidore, *De eccl. officiis* II.20.5, CCL 113, p. 91.

<sup>11</sup> *Ibid.*, II.20.7, p. 92.

<sup>12</sup> Hincmar, *De coercendo et exstirpando raptu* 4-5, PL 125:1020D-1021A.

if no man should separate what God has joined, how can the Apostle permit the dissolution of marriage? The answer, according to Ambrose, must be that not all marriage does come from God. Moreover, he argues, the text from Paul shows implicitly why there can be no divorce between Christians. The dissoluble marriages to which Paul refers are mixed marriages: that is, marriages between Christians and non-Christians. Inasmuch as these are not from God, God has not joined the partners together.

Ambrose's initial proof that mixed marriages are not from God consists in one brief sentence: "For Christians are not joined to the gentiles by the judgment of God, since the law prohibits this."<sup>13</sup> 1 Corinthians 7:12–16 was the source of what came to be known as the Pauline privilege (whereby, if one of two unbaptized persons who were united in marriage has converted and been baptized, the convert may dissolve the marriage under certain conditions). But this is not what Ambrose has in mind. Rather, he assumes that a Christian has married an infidel. Since their marriage is illicit, he reasons, it cannot be of God. And since God has not joined them, there is nothing to prevent man from separating them.

Ambrose supplies a second argument that expands and explains the first. The germ of this argument comes from 1 Corinthians 7:15: "if the unbelieving partner would separate, let him separate; in such cases the brother or sister is not subject to servitude. For God has called us to peace." It is the absence of peace in mixed marriages that makes them dissoluble. Ambrose's point of departure, however, is not this text but a dictum from Proverbs: "the wife will be prepared for her husband by God" (an Old Latin reading of Prov. 19:14).<sup>14</sup> He points out that the word in the Greek text corresponding to *praeeparabitur* is *harmozetai*. What is lacking in a mixed marriage is harmony. It is harmony by which a number of things come together and are adapted to each other, as in the case of a well-tuned musical instrument, such as a pipe-organ. There can be no harmony when a Christian illegitimately marries a non-Christian. Therefore, "where there is harmony, God joins [the spouses]; where there no harmony, there is contention and dissension, and this is not from God, because God is love

<sup>13</sup> *Expositio evangelii Lucae* VIII.2–3, CSEL 32.4, p. 392. Ambrose returns to the issue of mixed marriages in VIII.8, p. 395.

<sup>14</sup> Cf. Gen. 24:44: "ipsa est mulier, quam praeeparavit Dominus filio domini mei."

[*caritas*].”<sup>15</sup> How Ambrose would apply this analysis to marriage between infidels is not clear: there would be no source of religious dissent, but Ambrose might not wish to conclude that such marriages are joined by God.

If marriage is dissoluble when there is no harmony in it, so that it does not conform to the love (*caritas*) of God, it may seem that marriage ought to be dissoluble also when there is what we would call marital breakdown. Early medieval charters for divorce by mutual consent state that the marriage is to be dissolved because there is between the spouses not Godly charity (*caritas secundum Deum*) but discord, so that cohabitation has become intolerable.<sup>16</sup> Ambrose’s point, however, is that mixed marriages have not been harmoniously formed. For this reason, they are *apt* to produce dissent. In Christian marriage, on the contrary, the partners are adapted to live in concord. God calls Christians to peace, but they are not always at peace.

According to this analysis, God joins husband and wife insofar as they are already adapted to each other (especially in regard to their religion) and insofar as their marriage is valid in divine law. There is no suggestion that God intervenes to join a particular couple.

The idea that God joins and blesses particular marriages does appear in a few sources, and among these is the Vulgate version of Tobit (7:13–15). Raguel hands Sarah over to Tobias by placing her right hand in his, and with this he says: “The God of Abraham, the God of Isaac and the God of Jacob be with you, *and may he join you together, and fulfil his blessing in you.*”

The same idea is especially marked in Tertullian. Korbinian Ritzer has shown that certain passages in Tertullian that have often been regarded as referring to a nuptial liturgy are rather theological rather than liturgical statements. Ritzer’s reading of the evidence may be too conservative, for it is certainly possible that the texts in question reflect liturgical practice, even though none is sufficient evidence that there was such a liturgy. A passage from the *Ad uxorem*, in which Tertullian describes marriage “in the Lord” (that is, between two Christians), is a case in point:

<sup>15</sup> *Ibid.*, VIII.3, p. 393.

<sup>16</sup> See the following in *MGH Form.*: Marc. II.30 (p. 94); Tur. 19 (pp. 145–46); Merk. 18 (p. 248); Sen. 47 (p. 206).

How shall we ever be able to describe adequately the happiness of that marriage which the Church founds [*conciliat*], the offering [*oblatio*: i.e. eucharist] confirms, benediction seals [*obsignat benedictio*], the angels proclaim [as witnesses] and the Father ratifies?<sup>17</sup>

Whether or not Tertullian had any liturgical blessing in mind, he does explicitly refer to God's benediction of individual marriages. This blessing does not consist only in God's general approval of marriage. In the *De monogamia*, Tertullian defines marriage as follows: "There is marriage when God joins two persons in one flesh or, finding them already joined, seals their union in the same flesh."<sup>18</sup> Precisely what the two situations are is not clear. It may be that in the first case two Christians marry, while in the latter two pagans marry and then convert to Christianity. Be this as it may, Tertullian supposes that God blesses the individual Christian marriage, and he equates this blessing with God's joining of the couple.

The nuptial liturgy associates Jesus' dictum ("what God has joined together" etc.) with the rituals of joining and of the blessing of the ring. Moreover, the Biblical saying "what God has joined together" becomes the liturgical form "those whom God has joined together." In this way, the liturgy implies that God joins this man and this woman together. The ritual and the form in question are still familiar. The *Book of Common Prayer*, for example, directs the priest to join the right hands of the partners and to say: "Those whom God hath joined together let no man put asunder."<sup>19</sup> This formula is at least as old as the nuptial liturgy that Hincmar of Reims prepared for Ethelwulf and Judith, daughter of Charles the Bald, in the ninth century.<sup>20</sup> Here the ring was conferred as a sign of faith

<sup>17</sup> *Ad uxorem* II.8.6, CCL 1, p. 393. For Ritzer's interpretation, see *Le mariage*, pp. 110 ff. Schillebeeckx follows Ritzer: see *Marriage* (1976), pp. 352-55.

<sup>18</sup> *De monogamia* 9.4, ed. Mattei, SC 343, p. 170: "Matrimonium est, cum Deus iungit duos in unam carnem aut iunctos deprehendens in eadem carne coniunctionem signavit." Cf. 9.6, p. 172: "Adulteratur . . . qui aliam carnem sibi immiscet super illam pristinam quam Deus aut coniunxit in duos aut coniunctam deprehendit."

<sup>19</sup> For sources, see F. E. Brightman, *The English Rite* (1921), vol. 1, p. cxxiii (note to p. 806). The *Encheiridion* of Cologne has similarly "quos deus coniunxit."

<sup>20</sup> *MGH Capit.* 2, p. 426: "Accipe anulum, fidei et dilectionis signum atque coniugalitatis coniunctionis vinculum, ut non separet homo, quos coniungit Deus, qui vivit et regnat in omnia saecula saeculorum. Despondeo te uni viro virginem castam atque pudicam, futuram coniugem, ut sanctae mulieres fuere viris tuis, Sarra, Rebekah, Rachel, Hester, Iudith, Anna, Noëmi. . . ."

and love and as a token of the bond because of which no man should separate those whom God has joined together. The minister himself is said to marry (*despondere*) the woman to her husband as his wife-to-be, and to re-enact in this way God's joining of Eve to Adam.<sup>21</sup> Similarly, dotal charters from the eighth century refer to the future wedding as the occasion when "God will have joined us together."<sup>22</sup>

*Nuptial benediction as petition*

As well as commemorating the original blessing, the nuptial blessing is a petition for God to look favourably upon the new marriage. In this regard, the Christian nuptial blessing seems to have descended, by one means or another, from Jewish blessings.

In the Old Testament, a blessing was primarily a gift of God, a mark of his good favour, but one might also make a blessing as an acknowledgment of God's gifts or as a petition for them on behalf of someone else.<sup>23</sup> Fathers, especially at the moment of their death, blessed their sons or grandsons, asking God to bestow fruitfulness and prosperity upon them (e.g. Gen. 27:27–30 and 48:16).

The Book of Tobit was the chief Biblical source for the idea that the nuptial blessing was a petition for God's good favour upon a particular marriage. This book was known in the Latin West chiefly in the shape of Jerome's version, the Vulgate text. The structure of the long benedictions in the earliest texts of the nuptial mass—that is, the *Pater mundi conditor* of the Leonine and Gelasian sacramentaries and the *Deus qui potestate virtutis tuae* of the Gregorian sacramentary—is the same as that of Tobias's prayer for blessings upon his marriage in Tobit 8:7 ff. Since the structure and content of the Talmudic nuptial benediction are similar,<sup>24</sup> Tobias's prayer may have been based on an existing formula for a nuptial blessing to be spoken by

<sup>21</sup> Cf. Extr. I.13 (10th cent.?), *MGH Form.*, p. 542, line 14: "Qui [i.e. Deus] ergo uni viro [Adam] virginem unam [Evam] despondit quique duos in carne una constituit."

<sup>22</sup> E.g. Lind. 7, *MGH Form.*, p. 272, line 2: "et nos Deus insimul coniunxerit" (with reference to the forthcoming wedding); Big. 6, *ibid.*, p. 230, line 11: "quando nobis dies felicius nuptiarum insimul nobis Deus coniuncxerit."

<sup>23</sup> See, for example, Num. 6:22–27.

<sup>24</sup> See G. Anderson, "Celibacy or consummation in the Garden?", *Harvard Theological Review* 82 (1989), pp. 132–33 for a translation of the benediction and some comments. Translations may also be found in *The Authorized Daily Prayer-Book* (New York, 1946), p. 1013, and in *The Code of Maimonides, Book Four, The Book of Women*, trans. I. Klein (1972), p. 62.

the Jewish bridegroom. The early Church may have continued the Jewish blessing.<sup>25</sup> Ambrosiaster, as we have seen, says that the tradition of the benediction of marriage has remained in the Synagogue and is now practised in the Church. (By "Synagogue" he may mean "Jewish religion," for the Jewish marriage rite was a purely domestic one.) Any link between the Jewish rite and the Leonine, Gelasian and Gregorian nuptial masses, however, would be tenuous. Since medieval nuptial liturgies contain explicit references to the Book of Tobit, and since there is in addition some circumstantial evidence that Tobit influenced these forms, it is probable that Tobit was the chief means whereby elements of the Jewish ritual passed into the Christian tradition.

The Book of Tobit contains three benedictions, namely those of Raguel, Tobias and Gabael respectively.

The first benediction is spoken by Raguel when he espouses Sarah, his daughter, to Tobias (Tob. 7:13–15). Raguel hands Sarah over to Tobias by placing her right hand in his, and with this he says, "The God of Abraham, the God of Isaac and the God of Jacob be with you, and may he join you together, and fulfil his blessing in you." Only Jerome's version depicts the ritual of *dexterarum iunctio* and provides the words of the benediction.<sup>26</sup> Having blessed them, Raguel prepares the marriage charter, and after a minor feast, the couple retire to their chamber.

Tobias tells Sarah that for three nights they will be "joined to God;" only after the third night is over "will we be in our own marriage" (Tob. 8:4). On the first night, after the demon is expelled, Tobias prays for God's blessings upon the marriage. In the Vulgate, Sarah adds her own petition, although in the other versions she merely joins Tobias in saying "Amen." It is this prayer, the benediction of Tobias, that seems to have provided the structure for the longer benedictions in the early nuptial liturgies. The structure comprises three sections: (A) invocation of God as creator; (B) commemoration of the creation of Adam and of the formation of Eve as Adam's helpmeet; and (C) petition for blessings upon the present marriage (Tob. 8:7–10):

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<sup>25</sup> That there was some continuity between the Jewish and Christian nuptial benedictions is proposed in K. Stevenson, "The origin of the nuptial blessing," *Heythrop Review* 21 (1980), 412–16.

<sup>26</sup> Cf. RSV, 7:13: "... and taking her by the hand he gave her to Tobias

And Tobias said, [A] "Lord God of our fathers, may the heavens and the earth, and the sea, and the fountains, and the rivers, and all your creatures that are in them, bless you. [B] You made Adam of the dust of the earth, and gave him Eve for a helper. [C] And now, Lord, you know that not for fleshly lust do I take my sister to wife, but only for the love of posterity, in which your name may be blessed for ever and ever." Sarah also said, "Have mercy on us, O Lord, have mercy on us, and let us both grow old together in health."

It may be noted that the third section (C) is in two parts referring respectively (i) to the right use of the sexual act and to procreation, and (ii) to longevity. Tobias affirms that he has married not out of lust but because of his desire for progeny (v. 9), while Sarah petitions that they should grow old together in good health (v. 10). She also asks the Lord to have mercy on them. These elements appear in rearranged form in the earliest liturgical benedictions of the Roman tradition. (Although the Vulgate version of the prayer differs from the other versions in detail, the latter share the same tripartite structure and general content.)

The book of Tobit contains a third marriage blessing. Gabael says to Tobias (Tob. 9:10–12):

The Lord God of Israel bless you because you are the son of a man who is very good and just, who fears God and gives alms. And may a benediction be said over your wife, and upon your parents. And may you see your children, and your children's children, unto the third and fourth generation. And may your seed be blessed by the God of Israel, who reigns for ever and ever.

It was by virtue of its theme of continence that the story of Tobit recommended itself to moralists like Jonas of Orléans (d. 843),<sup>27</sup> but some writers associated Tobit with the blessedness of marriage (that is, with its approbation by God), or even with nuptial benediction itself. The angel Raphael's involvement in Tobias's wedding, like Christ's involvement in the wedding feast in Cana, suggested that marriage had God's approval. Thus a Salic dotal charter from the tenth or eleventh century, having cited Genesis 1:28 and 2:24, turns to the story of Tobias and to the marriage at Cana:

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to be his wife, saying, 'Here she is; take her according to the law of Moses, and take her with you to her father.' And then he blessed them."

<sup>27</sup> *De institutione Laicali* II.1–2, *PL* 106:168D ff. Cf. Ben. Lev. II.230 and III.388 (*PL* 97:775A and 847A); and Caesarius of Arles, *Sermo* 43.5, *CCL* 103, pp. 192–93.



Moreover, we read that an angel came down from heaven to Tobias, to corroborate his marriage. And our Lord Jesus Christ deigned to sanctify marriage by his presence, just as he had acceded to it in the beginning, for he showed his esteem for it by performing the first of his miracles in the presence of his disciples, turning water into wine and making the hearts of the partakers of the feast rejoice.<sup>28</sup>

Pope Nicholas I, describing the Roman nuptial procedures to the Bulgarians (AD 866), cites Tobit to justify the practice of nuptial benediction. He explains that the bride and groom, having entered the church bearing offerings, stand before the priest. The latter blesses them and places over them the "celestial veil," just as God placed Adam and Eve in paradise and blessed them, saying, "Increase and multiply." In the same way as prayers are said over marriage in the nuptial liturgy, Nicholas argues, so Tobias prayed to the Lord with his wife before he joined her in marriage.<sup>29</sup>

The treatment of marriage in Tobit, therefore, was familiar in the early Middle Ages and was associated with the practice of nuptial benediction. Tobit's influence upon nuptial liturgies from the eleventh and later centuries is explicit. Raguel's benediction—"The God of Abraham, the God of Isaac and the God of Jacob be with you, and may he join you together, and fulfil his blessing in you" (Tob. 7:15)—appears in nuptial liturgies contained in the *Sacramentary of Vich* and the *Benedictional of Archbishop Robert*, both from the eleventh century.<sup>30</sup> It re-appears in the Sarum marriage service (mid fourteenth century).<sup>31</sup> These three sources also contain a longer benediction that is based upon Raguel's blessing but contains a distant echo of Gabael's (i.e., Tob. 9:10–11).<sup>32</sup>

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<sup>28</sup> Extr.I.12, *MGH Form.*, p. 541: "Sed et angelum de caelo ad corroborandam nuptiarum copulam ad Tobin venisse legimus. Dominus quoque noster Iesus Christus nuptias, quas in mundi origine concesserat, dignatus est sua sanctificare praesentia, honorans eas initio signorum suorum coram discipulis suis, aquam in vinum vertens et convivantium corda laetificans." Cf. Ambrosiaster, *Quaest.* 127.7, *CSEL* 50, p. 401: "Ipse [Christus] enim rogatus ad nuptias ire non dedignatus est et non solum praesentia sui inlustravit eas, verum etiam contulit quod deerat ad laetitiam. Scriptum est enim, quia vinum laetificat cor hominis [Ps. 103:15]."

<sup>29</sup> *Epist.* 99.3, *MGH Epist.* 6 (*Epist. Kar. Aevi* 4), p. 570, lines 8–13.

<sup>30</sup> See Ritzer, *Le mariage* (p. 1970), p. 441, n. 1425 (for *Vich*); *ibid.*, p. 445, n. 12<sup>c</sup> (for Robert's *Benedictional*).

<sup>31</sup> *Missale Sarum*, ed. F. H. Dickinson (1861–83), col. 834\*.

<sup>32</sup> See Ritzer, *Le mariage*, pp. 440–41, n. 1424 (*Vich*); *ibid.* p. 445, n. 12<sup>s</sup> (Robert's *Benedictional*); and *Missale Sarum*, col. 835: "Deus Abraham, Deus

The story of Tobias's nights of abstinence left its mark on the liturgy as well. In *Vich*, immediately after Raguel's blessing, a rubric directs the priest to tell the bride and groom before giving them communion "that out of respect for holy communion they should keep themselves free of pollution until the third night." In another blessing from Robert's *Benedictionary*, the priest prays that the angel of God should be with them and protect them from the ravages of the devil.<sup>33</sup> Moreover, this *Benedictionary* contains a prayer that refers explicitly to the story of Tobias and Sarah:

Look down, O Lord, from your holy heaven upon this covenant, so that just as you sent your holy angel Raphael to Tobias and to Sarah, Raguel's daughter, so also, Lord, should you deign to send your blessing upon these young people, so that they might remain steadfast and stand together in accord with your will and live for many years in your love, as they grow up, grow old and multiply.<sup>34</sup>

The Sarum rite included this prayer, and it passed thence into the 1549 English prayer-book.<sup>35</sup>

Although Korbinian Ritzer has shown that there is no strong evidence either of marriage *in facie ecclesiae* or of a nuptial liturgy before the fourth century,<sup>36</sup> one cannot safely assume that there was no nuptial liturgy or blessing before this time, and it would be rash to suppose that such practices were not observed in an earlier era. Be this as it may, no texts of the nuptial mass from before the seventh century have survived. Three early medieval texts of the nuptial mass are extant.<sup>37</sup> One is in the Leonine Sacramentary, under the heading *Velatio nuptialis*. The *Leonianum* is really a collection of *libelli missarum* rather than a sacramentary in the proper sense. It survives in one MS (Verona 85), which dates from the mid seventh century. While it may have been prepared at Verona, much of its content is of Roman origin. Another text is that contained under the heading *Actio nuptialis* in the oldest extant repre-

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Isaac, et Deus Jacob, benedic adolescentes istos, et semina semen vitae aeternae in mentibus eorum; ut quicquid pro utilitate eorum didicerint, hoc facere cupiant. Per [etc.]."

<sup>33</sup> See Ritzer, p. 443.

<sup>34</sup> Ritzer, p. 445, n. 12<sup>f</sup>.

<sup>35</sup> It did not occur in the 1552 and 1661 versions. See *Sarum Missal*, col. 835\*; and F. E. Brightman, *The English Rite* (1921), p. 810.

<sup>36</sup> K. Ritzer, *Le mariage* (1970), pp. 81-94 and pp. 104-23.

<sup>37</sup> See Ritzer, *Le mariage*, pp. 238-46 for commentary on these texts, and *ibid.*, pp. 421-29 for the texts themselves.

sentative of the Gelasian family of sacramentaries (i.e., MS Vat. Reg. 316). This source was probably prepared in the first half of the eighth century at the Benedictine abbey of Chelles, in northern France. It is, *ex professo*, a sacramentary for the Roman rite, although it contains some Gallican elements. The third source comes under the heading *Oratio ad sponsas velandas* in the *Sacramentarium Hadrianum* (or *Gregorianum*), the mass-book that Pope Hadrian I gave to Charlemagne in the late 780s.

These three early forms show that the practice of liturgical benediction and joining, and the petitions that went with it, provided the forum for a distinctive form of theological reflection upon marriage. This focused on the right aspirations of those who became married and on the place of marriage in the history of world and in God's dispensation. Let us examine these in detail.

#### *The Leonine form*

After an all-purpose collect, the Leonine form<sup>38</sup> provides a secret, a *Hanc igitur* and a post-communion that are specially adapted to the nuptial mass. The secret asks God to receive the offerings "in accordance with the sacred law of marriage." The *Hanc igitur* that follows treats the offering (and by implication the eucharistic sacrifice) as an oblation that "we" offer up on behalf of the bride:

We therefore beseech you, O Lord, to accept this offering of your maid-servant, which we offer to you on behalf of this woman your handmaid. On her behalf we humbly entreat your majesty, that just as you have granted that she should reach marriageable age, so also should you complete what you have done in her when she has been joined in marriage, so that she may rejoice in having the offspring she desires, and that you should grant that she might have the good fortune to grow old with her husband. Through [Christ our Lord. Amen.]

The post-communion that follows (*Quaesumus omnipotens Deus*) asks God to grant longevity and peace to those whom he is joining together.

After another short prayer (the *Adesto domine supplicationibus nostris*), the sequence ends with the long and splendid benediction *Pater mundi conditor*. The *Adesto domine* is in the style

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<sup>38</sup> For a diplomatic edition, see L. C. Mohlberg, L. Eizenhöfer and P. Siffrin (eds), *Sacramentarium Veronense* (1956), pp. 139–41. Ritzer, in *Le mariage*, pp. 422–23, offers a conjectural reconstitution of the primitive text.

of a collect but serves here either as a short benediction or as an introduction to the benediction that follows. It asks God to be mindful both of the supplications of those present and of what he himself has instituted and ordained to be the means whereby humankind should procreate, "so that what is joined by you as author should be maintained with your help." The prayer thus observes the distinction between getting married and being married. The text attributes the joining of the couple in marriage to God, whose help and protection is sought for the married life that will follow.

The structure of the benediction *Pater mundi conditor* is essentially the same as that of the prayer of Tobias and Sarah in the Book of Tobit, that is: (A) invocation of God as creator; (B) commemoration of the creation of Adam and of Eve as Adam's helpmeet; and (C) petition for blessings upon the present marriage (cf. Tob. 8:7–10). The prayer begins (A) by invoking God as the Father, the creator of the world, and the source of all life, and goes on to describe (B) how God made "with his own hands" the first man and the first woman, the couple from whom all humankind would multiply. God made Eve as a companion for Adam. She was bone of his bone, so that her body was of the same form as his and yet marvelously different. In making the first couple, God also instituted marriage as the means by which humankind would procreate, so that the whole human race is linked together by its common descent. Although the one whom God made like the man was much weaker than the one whom he had made in his own likeness, the addition of the weaker sex to the stronger was the means that God chose for procreation. By this means, generation succeeds generation, and the posterity of Adam and Eve endures without end despite the brief span of mortal life.

Turning from these considerations to the man and woman who are to be married, the priest next asks God (C) to sanctify the woman and her marriage, so that she may observe the precepts of the eternal law. She has entered marriage not only to be permitted to do what marriage makes permissible, but also to fulfil the holy obligations of steadfast fidelity that she has thereby acquired. The priest asks that she should marry in Christ as a woman who is faithful and chaste, and that she should follow the example of holy women, being as dear to her husband as Rachel, as wise as Rebekah, and as long-living and as faithful as Sarah. He prays that she should do nothing that Satan, the author of transgression, can claim for himself;

that she should remain steadfast in fidelity, observing the precepts; that, being devoted to the true God as his maid-servant, she should fortify her weakness with the strength of discipline; and that she should remain true to her marriage bed and shun adultery. "May there be in her both a grave modesty and a reverent propriety." Finally, the priest prays that the woman, instructed in the teachings of heaven, should be fruitful in offspring, should remain proven and innocent, and should attain at last the peace of the blessed and the kingdom of heaven.

The statement (in section B) to the effect that God made Eve like Adam, while he made Adam like himself, derives ultimately from 1 Corinthians 11:7. Here Paul argues that man is "the image and glory of God," while woman is "the glory of man." The statement conforms with Ambrosiaster's exegesis of this text, for while Augustine argued that man and woman were equally in God's image, Ambrosiaster took this text at its face value and deduced that God made man alone, and not woman, in his own image.<sup>39</sup> In his view, the image consisted in an analogy between the manner in which all mankind proceeded from one man, Adam, and the procession of all creation or all living beings from one principle, God. Following Genesis 1:28, Ambrosiaster associated the image with dominance and argued on this basis that God did not make woman, the weaker sex, in his own image.<sup>40</sup> This interpretation is unusual in extant Latin patrology, but it may have been conventional and traditional in Ambrosiaster's milieu. The notion that mankind is knit together by proceeding from a common ancestor, which also appears in the Leonine benediction, is also congruent with Ambrosiaster's theory (although the same thesis is explicitly stated in the opening passage of Augustine's *De bono coniugali*).

The petition that the bride should be mindful that she has married not only for the sake of licit sexual relations (*ad licentiam coniugalem*)<sup>41</sup> may echo, as Ritzer suggests, Tobias's affirmation that he has married not for the sake of lust (*luxuria*) but because

<sup>39</sup> See P. L. Reynolds, "Bonaventure on Gender and Godlikeness," *Downside Review* 106 (1988), pp. 174-79.

<sup>40</sup> See *Quaestiones* 21, *CSEL* 50, pp. 47-48; *ibid.*, 24, p. 51; *ibid.*, 45, pp. 82-83; *ibid.*, 106.17, pp. 243-4; ad 1 Cor. 11:5-7, *CSEL* 81.2, pp. 121-2; ad 1 Cor. 14:34, *CSEL* 81.2, p. 163; ad Col. 3:8-11, *CSEL* 81.3, pp. 195-7.

<sup>41</sup> "Memineritque se, domine, non tantum ad licentiam coniugalem, sed ad observantium fidei sanctorum pignorum custodiam delegatam."

of his desire for progeny. This occurs in the corresponding place in Tobias's benediction (Tob. 8:9, Vulgate).<sup>42</sup>

It is interesting to note that the three holy women, Rachel, Rebekah and Sarah, appear (with two more) in the version of Tobias's benediction found in the London Hebrew MS of the Book of Tobit.<sup>43</sup> Here the women appear in the second part of the prayer (that is, the part spoken by Sarah) as examples of childbearing. Perhaps this is mere coincidence.

*The Gelasian form*

In the text of the Leonine form, the two benedictions (*Adesto domine supplicationibus nostris* and *Pater mundi conditor*) come at the end, after the post-communion. It is reasonable to assume that the sequence of the liturgy followed the same order, although we cannot be sure of this. The Gelasian form makes the sequence explicit by means of rubrics.<sup>44</sup> The prayers *Adesto domine supplicationibus nostris* and *Quaesumus omnipotens Deus*, which occur after communion in the Leonine form, serve here as opening collects. The secret that follows combines material from the Leonine's *Adesto domine supplicationibus nostris* and *Hanc igitur*.

Pay heed, O Lord, to our supplications and to the offering of these your handmaids, which they offer to you on behalf of this woman, your servant. You have deigned that she should come to the age of maturity and to her wedding day; may it please you to vouchsafe that what has been brought about by your disposition may be completed by your grace.

The handmaids, as Ritzer suggests, may be bridesmaids (*paranymphae*).

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<sup>42</sup> The Leonine form is here nearer to the pre-Vulgate traditions than to the Vulgate itself: according to the *Vetus Latina* Tobias marries "in truth" (*ipsa veritate*, from LXX *ep'alêtheias*) rather than out of lust (*luxuriae causa*).

<sup>43</sup> Ed. M. Gaster, *Proceedings of the Society of Biblical Archaeology* 18 (1986), p. 271, Tob. 8:20–21: "And now, oh Lord, oh king, full of mercy, give ear to my prayer, and hold not thy peace at my tears, as thou hast listened to the prayer of our mother Sara; when she prayed to thee because of her handmaid Hagar, and to the prayer of Rebekah when the children struggled together within her; and to the prayer of Rachel, the mother of children, who was the barren woman in the house at the time when her sister provoked her sore; thou didst open her womb, and she bare children that are standing in thy courts to serve thee." This version, which is the only one besides Jerome's that contains the passages emphasizing continence (among which is the episode of the "nights of Tobias"), is thought to have been influenced by the Vulgate.

<sup>44</sup> See Ritzer, *Le mariage*, pp. 424–26; also *Liber sacramentorum Augustodunensis*, CCL 159B, pp. 203–04.

After a preface and a *Hanc igitur*, a rubric directs the priest to say the canon and the Lord's prayer and then to bless the bride. This benediction takes the form of two prayers. The first is a brief petition commemorating the original blessing of marriage and of procreation, and asking God to pour out his blessings upon this woman and her marriage now, just as he blessed the marriage of Adam and Eve. The second is the same prayer *Pater mundi conditor* that we noted in the Leonine form. Communion follows. Finally, there are two post-communions. The first is a benediction not of the bride alone but of the couple (*Domine, sancte Pater, omnipotens aeternae Deus*). Here the priest prays that God should foster the joining together of his servants and protect them from every scheme of the enemy, so that they should be worthy to receive God's blessings and be made fruitful with the issue of children. The priest prays that God should confirm their marriage as he confirmed the marriage of Adam, and that they should imitate the sanctity of the Fathers (that is, the Patriarchs) even in marriage itself.

*The Gregorian form*

The collect, secret, preface, *Hanc igitur* and post-communion of the Gregorian form<sup>45</sup> need not detain us. After these prayers, the long benediction *Deus qui potestate virtutis tuae* follows. While the third section of this prayer (C) is very similar to that of the *Pater mundi conditor*, the first two sections (A–B) are new. This famous and splendid prayer is worth quoting in full:

[A] O God, who by your almighty power have made all things from nothing and who, all things having been established in the beginning, [B] created woman as the inseparable helpmeet of man, who was made in God's image, so that you made the woman's body out of flesh taken from the man, thereby teaching that what you have been pleased to make from one principle must never be permitted to be separated; O God, who made the union of marriage sacred by this excellent mystery whereby you prefigured the sacrament of Christ and the Church in the compact of marriage; O God, through whom the woman was joined to the man and who ordained this covenant in the beginning, and gave with it a blessing that alone neither the punishment of original sin nor the judgment of the flood could take away; [C1] look favourably upon this woman, your maid-servant, who is to be joined in marriage. She beseeches you to fortify her with your protection. [C2] May her marriage be to her a bond of love and peace. May she marry in Christ as a woman

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<sup>45</sup> Ritzer, *Le mariage*, pp. 427–28.

who is faithful and chaste, and may she ever follow the example of holy women: may she be as dear to her husband as Rachel, as wise as Rebekah, and as long-living and as faithful as Sarah. [C3] May she do nothing that the author of transgression can claim as his own. Steadfast in faith and in the precepts, may she remain faithful to her marriage bed, may she shun illicit relations, and may she fortify her weakness with the strength of discipline. May there be in her grave modesty and reverent propriety. [C4] Instructed in the teachings of heaven, may she be fruitful in offspring and may she be proven and innocent. May she attain at last the peace of the blessed and the kingdom of heaven. And may she see her children's children unto the third and fourth generations and live to enjoy an agreeable old age. Through [Christ our Lord. Amen.]

The final petition—"may she see her children's children unto the third and fourth generations"—is from Gabael's blessing in the Book of Tobit (9:11). The statements (in section B) that through God "the woman was joined to the man," and that God "ordained this covenant in the beginning, and gave with it a blessing that alone neither the punishment of original sin nor the judgment of the flood could take away," echo a gloss on Genesis 1:27–28 in Augustine's *De Genesi ad litteram*.<sup>46</sup> Where Augustine affirms that original sin has not taken away the blessing and justification of marriage, the Gregorian text adds that the flood did not do so either, for the blessing given to Adam and Eve in Genesis 1:28 was repeated to Noah and his sons after the flood (Gen. 9:1, 7).

The Gregorian form incorporates (in section B) a reference to the mystery of Ephesians 5:32: the compact of marriage prefigured the sacrament of Christ and the Church (that is, their mysterious union). The addition might seem inevitable, but in fact the use of Ephesians 5:32 is rare in the nuptial liturgy of the Latin West. Only rarely, likewise, was the Epistle of the nuptial mass taken from the fifth chapter of Ephesians.<sup>47</sup>

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<sup>46</sup> "Deus per quem mulier iungitur uiro, et societas principaliter ordinata ea benedictione donatur, quae sola nec per originalis peccati poenam nec per diluuii est ablata sententiam." Cf. Augustine, *De Genesi ad litteram* IX.3, CSEL 28.1, p. 271: "Quae ratio [Gen. 1:27–28] conditionis et coniunctionis masculi et feminae atque benedictio nec post peccatum hominis poenamque defecit."

<sup>47</sup> See Ritzer, *Le mariage*, p. 252.



*The bridal blessing*

Perhaps the theology of Ephesians 5 is implied in a curious feature of the Leonine, Gelasian and Gregorian forms: namely, the tendency to treat the nuptial liturgy as a blessing of the bride alone rather than of the couple or of their marriage.<sup>48</sup> Was she the only one who needed God's support? According to a thesis proposed by De Jong and elaborated by Schillebeeckx, the blessing of the bride must have evolved from the blessing of the couple and their marriage. We should consider this thesis and its evidence briefly. The relevant facts are these.

First, in its earliest form, the nuptial liturgy of Rome involved the veiling of the bride and groom together. This veil, which the priest applied with his blessing, was distinct from the veil that the bride wore to her wedding (the Roman *flammeum* and its descendants). In due course, the practice of veiling the couple spread throughout the Latin West. An early witness to it is Paulinus of Nola (d. 431), who describes how the bishop, "joining the heads of them both under the conjugal peace, veils them with his right hand and sanctifies them with a prayer."<sup>49</sup> Isidore of Seville, as we have seen, notes two distinct nuptial veils: the *mafors* worn by the bride to signify her subjection to her husband; and the *vitta* that the priest placed upon the couple after blessing them.<sup>50</sup> The only mention of veiling in the early forms discussed above occurs in the rubric of the Gregorian form, which calls the rite a "prayer for the veiling of brides" (*oratio ad sponsas velandas*).

Second, the three early liturgies focus, as it were, upon the bride. In the Leonine form, the *Hanc igitur* refers to the oblation that "we offer to you on behalf of this woman your hand-maid" ("quam tibi offerimus pro famula tua illa"). The petitions and benedictions of the *Pater mundi conditor* all pertain exclusively to the bride. There is no explicit blessing of the couple or of their marriage, although the prayer *Adesto domine supplicationibus nostris*, which introduces the long benediction, asks for God to sustain what he has joined. A similar pattern occurs in the Gelasian form, where the short petition preceding

<sup>48</sup> See Ritzer, *Le mariage*, p. 241; J. P. de Jong, "Brautsegen und Jungfrauenweihe," *Zeitschrift für katholische Theologie* 84 (1962), 300–22; E. Schillebeeckx, *Marriage* (1976), pp. 304–12.

<sup>49</sup> *Carmen* 25, 227–228, *CSEL* 30, p. 245: "Ille iugans capita amborum sub pace [i.e. sub osculo pacis?] iugali uelat eos dextra, quos prece sanctificat."

<sup>50</sup> *De eccl. officiis* II.20.6–7, *CCL* 113, pp. 91–92.

the *Pater mundi conditor* asks for God's blessings "upon this woman your handmaid." In this rite, the post-communion (*Domine, sancte pater, omnipotens aeternus Deus*) asks God to bless and confirm *their* marriage, but there is no such prayer in the Gregorian rite, in which both the *Hanc igitur* and the long benediction (the *Deus qui potestate virtutis tuae*) pertain exclusively to the bride.

What are we to make of this? Schillebeeckx observes that "there was a marked tendency in the liturgy of Rome to give the central position to the bride in marriage, and consequently to regard the marriage blessing as a blessing of the bride." Furthermore, he attempts to trace an evolution from older forms in which the priest blessed the couple and their union. He argues that the *Adesto domine* that introduces the long benediction in the Leonine form is a vestige of an earlier form in which the priest blessed the marriage itself, and that the same "ancient marriage blessing" is further diminished by being relegated to an opening collect in the Gelasian form. In the *Gregorianum*, he argues, the rubric *Oratio ad sponsas velandas* shows that the whole form has become "a blessing and a veiling of the bride alone." By virtue of the shift from the blessing of the marriage to the blessing of the bride, marriage has been assimilated to the dedication of a virgin (a ceremony which also involved veiling and blessing). Schillebeeckx asserts that the editor of the *Gregorianum* had the Leonine ritual for the dedication of virgins in mind when he prepared the rite of marriage. Schillebeeckx sees in these developments "an entire theology of marriage" that pertains to 1 Corinthians 11:7 and above all to Ephesians 5:32. The priest blesses the bride alone because her marriage symbolizes that of the Church to Christ. Whereas in the dedication of a virgin, there was an actual marriage to Christ, in the blessing of a bride there was a symbolic or "sacramental" marriage to Christ.

This theory is attractive, and there is probably some truth in it, but as stated it contains much that cannot be substantiated. Without knowledge of the pre-history of these rites, the evolution that Schillebeeckx posits is a matter of conjecture. Bridal blessings may have had deeper roots in tradition, for both the Roman and the Germanic peoples regarded marriage as the giving of a bride by her father to her husband. Moreover, the only direct evidence that there was a shift in the early Middle Ages from veiling the couple to veiling the bride alone is the rubric *Oratio ad sponsas velandas* in the Gregorian rite.

One might argue that in these rites marriage has become an essentially priestly affair, so that the benedictions had more to do with what was of concern to the clergy (that is, the relation between Christ and the Church) than with the immediate concerns of marrying persons. This would be a mistake. When one looks at the texts of the benedictions, one finds that they have more to do with married life itself than with the symbolism of marriage.

Schillebeeckx's interpretation may distract our attention from the most remarkable feature of these forms, namely that the early nuptial liturgies contain little that pertains either to the New Testament's treatment of marriage or to the theological and canonical tradition that derived from it. The "great sacrament" of Ephesians 5:32 and the prophetic and symbolic relation between marriage and Christ's union with the Church were themes that were central to the treatment of marriage by authors such as Tertullian, Ambrose, Augustine, Leo and Hincmar. The nuptial liturgies, on the contrary, contain very little reference to these themes, and indeed little reference to the New Covenant. The dominant themes and influences (Adam and Eve, Tobit, the Patriarchs and their wives, the blessing of fecundity) belong to the Old Testament. This is fitting inasmuch as the Latin Fathers tended to regard marriage as something that belonged more to the Old Covenant than to the New, but it is surprising none the less. Contrariwise, the notions of benediction and joining remained undeveloped in Western theology and canon law (and, one might add, played only a minor and incidental role in the development of the theory of marriage as a sacrament in the high Middle Ages).

### *Conclusion*

While the practice of nuptial benediction attracted to itself a special form of theological reflection upon marriage and gave rise to liturgical prayers of extraordinary beauty, the liturgical tradition on the one hand and the theological and canonical tradition on the other remained largely independent of one another.

One should not simply identify nuptial blessing with God's blessing and joining, nor even regard it as the quasi-sacramental occasion for God's action. It is true that some Carolingian authors, including Hincmar, affirmed that there could be no true marriage without public nuptials and benediction.<sup>51</sup> While

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<sup>51</sup> See below, pp. 402–08.

such statements involve a degree of rhetorical overstatement, they cannot be entirely dismissed. Nevertheless, in the Roman tradition, only those who were marrying for the first time could be blessed by a priest. Ambrosiaster is our earliest witness to this practice, and Pope Nicholas I mentions it in his reply to the Bulgarians (written in 866).<sup>52</sup> Caesarius of Arles (d. 542) is a witness to the Roman custom whereby not only widows but also persons marrying for the first time who had not preserved their chastity were precluded from benediction, and he seems to have introduced this practice in his diocese.<sup>53</sup> Jonas of Orléans and Benedictus Levita testify to the fact that by the ninth century these Roman customs had become generally adopted in Francia.<sup>54</sup> But no-one claimed that widows, widowers and *corrupti* could not legitimately marry. Hincmar of Reims seems to have supposed that when a man and woman became married by means of the *normative* nuptial process (which involved petition, betrothal, dotation and nuptials), the nuptials were the occasion when God blessed and united the couple. Despite this, one should generally regard the ritual of veiling, benediction and joining as symbolic. Hincmar himself, in the passage quoted above, says that the Church blesses marriage in imitation of what God did.

While we find Christianization of the most obvious kind in the nuptial liturgy, the Western tradition by and large did not treat this liturgy as if it was essential to the validity of marriage. The doctrine of indissolubility, and not the liturgy, was the chief means by which the Western Church Christianized marriage and set it apart from other forms of *societas*.

The nuptial blessing, then, commemorates the original blessing of Adam and Eve in Genesis 1:28, when God blessed them, and said "Be fruitful and multiply." In blessing the bride or the couple, the priest proclaims that marriage is part of God's plan for humankind, and that it is the means chosen by God for procreation. God's blessing can also be equated with the good favour that all marriages, or at any rate all with the right characteristics, find in his eyes, for in blessing the marriage of Adam and Eve, God blessed marriage in general. The nuptial

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<sup>52</sup> Ambrosiaster, *Ad Corinthios prima* 7:40, *CSEL* 81.2, p. 90. Nicholas, *Epist.* 99.3, *MGH Epist.* 6, p. 570, line 13: "Verumtamen velamen illud non suscipit qui ad secundas nuptias migrat."

<sup>53</sup> *Sermo* 42.5, *CCL* 103, p. 188; and *Sermo* 43.5, *ibid.*, pp. 192–93.

<sup>54</sup> See Jonas of Orléans, *De institutione laicali* II.2, *PL* 106:170D–171A; and Ben. Lev. II.130, II.408 and III.179 (*PL* 97:765A, 798D and 820D).

blessing is also a petition that God should favour this particular marriage, and in this regard it owes much to the to the Book of Tobit and to the Jewish tradition. The idea that God blesses individual marriages does appear in the Western tradition, but it is not well developed.

Much the same might be said about joining. First, the original joining took place when God brought Eve to Adam in Genesis 2:22. Second, God's joining of the couple, from one point of view, amounts to the indissolubility of their marriage and of all marriages in the Church. Thirdly, one may suppose that God intervenes in a particular way by joining individual couples, although this idea remains undeveloped. Fourthly, the nuptial joining of bride and bridegroom by a priest re-enacts the joining of Eve and Adam in the Garden of Eden and symbolizes the doctrine that no man should separate what God has joined.

## CHAPTER SEVENTEEN

### MARRYING IN THE FRANKISH CHURCH

#### *The Nuptial Process*

A variety of sources provide a fairly good picture of the nuptial process among the Franks. In accordance with Germanic customs, the suitor would petition the girl's *parentes* or guardian for her hand in marriage. It was the custom among the Salian Franks to ratify the agreement by the token payment of a solidus and a denarius (that is, thirteen denarii) to the girl's father or guardian. The function of this payment was similar to that of the Visigothic *arrha*, although some scholars have regarded it as a vestigial brideprice.

The account of the marriage of Clovis to the Burgundian princess Clotild in the chronicles of Fredegar illustrates some of these points. Clotild was in internal exile, since Gundobad, her paternal uncle, had murdered her parents. By means of an intermediary called Aurilianus, Clovis sent a ring to Clotild and asked for her hand in marriage. Clotild accepted, sending a ring in return to Clovis, and asked Clovis to petition Gundobad for her hand by means of envoys. Clovis sent the envoys, Gundobad agreed (being frightened lest he should antagonize Clovis), and the envoys gave him a solidus and a denarius, as was customary, the narrator tells us, among the Franks. Clotild was brought back to Clovis, taking with her a considerable fortune (the equivalent of the Lombards' *faderfio*).<sup>1</sup> The giving of rings in this case seems to have been a preamble to the betrothal, a form of preliminary courtship rather than a case of a formal *subarrhatio cum anulo*.

During the early Middle Ages, among both Roman and Germanic peoples, the nuptial process was elaborate. The various elements of its normative and customary form, which might take place sequentially over a considerable period of time, took the couple gradually towards marital union. Gregory of Tours records how as a young man St Liphard was persuaded by his father to become betrothed. After he had given his *sponsa* a

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<sup>1</sup> *Chronica Fredegarii* 3.18, *MGH Script. Rer. Mer.* 2, pp. 99–100.

ring, he proffered the *osculum*, presented her with a shoe and celebrated the betrothal (*sponsalia*).<sup>2</sup> The word *osculum* probably refers here to the betrothal kiss, although in early medieval Latin the word came to connote, and perhaps even denote, the deed of gift that the kiss confirmed, or even the gift itself. It is not clear, indeed, whether the *osculum* in this sense was always accompanied by a kiss.<sup>3</sup>

In St Liphard's case, it is probable that the *osculum* and the gift of a shoe took place at the time of the betrothal, although we cannot be sure of this. In the case of St Venantius, the gift of shoes took place after the betrothal. As a youth, the saint was "tied with the betrothal bond" (*"sponsali vinculo obligatur"*) by his *parentes*. In due course, having warmed to the relationship, he began to court the girl and had got as far as making a gift of shoes to her before deciding that "it is better to remain unpolluted and to serve Christ than to become ensnared by the contagion of this world through the bond of marriage."<sup>4</sup> Here it seems that the initial betrothal, while binding as far as the parents were concerned, needed to be confirmed subsequently by betrothal gifts. Having been betrothed in infancy, the partners would have expressed their own consent in due course. There is no suggestion that Venantius committed a sin (*quod absit!*) in failing to fulfil his betrothal promises, although it may be significant that in his case, a higher calling obviated the nuptial process.

While the origin of the gift of shoes remains a mystery, the origin and significance of the betrothal kiss are better known.<sup>5</sup> It is possible that it originated as a pagan custom in the Latin West, although there are no references to it in pre-Christian sources. The betrothal kiss was familiar to the imperial administration and well known in Spain as well as in North Africa. As we have seen, Tertullian referred to the practice,<sup>6</sup> and Constantine referred to it in a constitution he sent to the *vicarius*

<sup>2</sup> *Vitae patrum* 20 (vita Leobardi), *MGH Script. Rer. Mer.* 1.2 (1885 edition), p. 741: "Denique, dato sponsae anulo, porregit osculum, praebebat calciamentum, caelebrat sponsaliae diem festum."

<sup>3</sup> See the article "osculum" in Niermeyer's *Mediae Latinitatis Lexicon Minus*.

<sup>4</sup> *Vitae patrum* 16 (vita Venantii), *MGH Script. Rer. Mer.* 1.2 (1885 edition), pp. 724–25.

<sup>5</sup> See L. Anné, "La conclusion de mariage," *Ephemerides Theologicae Lovanienses* 12 (1935), pp. 529–31; and S. Treggiari, *Roman Law* (1991), pp. 149–52.

<sup>6</sup> See Tertullian, *De virginibus velandis* 6.2, *CCL* 2, p. 1215; and *De oratione* 22.10, *CCL* 1, p. 271.

of Spain in AD 336.<sup>7</sup> The *Lex Visigothorum* says nothing about the betrothal kiss, although it does appear in the Mozarabic liturgy of the *arrha*.<sup>8</sup> Constantine's law of AD 336 appeared in both the Theodosian code and Alaric's *Breviary*. It is cited in the preamble to a Frankish dotal charter from a ninth-century source, which says that the *sponsus* confers his gift upon the *sponsa* at the betrothal by means of the charter and confirms this with a kiss.<sup>9</sup> This charter evidently pertains to the Roman tradition.

The betrothal took place in the presence of witnesses. These would normally include relatives from both sides.<sup>10</sup> We learn from Gregory of Tours that the betrothal (*sponsalia*) of the orphaned niece of a certain abbess took place in the latter's monastery. The abbess, acting *in loco parentis*, received the *arrha* in the presence of the bishop, members of the clergy and local dignitaries.<sup>11</sup> At least during the Carolingian period, a marriage required the consent of both families, and not only of the bride's.<sup>12</sup>

Germanic law sometimes determined the standard amount of the dowry. It might be worth 25 or 62 1/2 solidi under Salic law and 50 solidi under Ripvarian law.<sup>13</sup> Such gifts were modest compared with the five cities that Chilperic gave to Galswinth as her combined dowry and morning gift.<sup>14</sup> The gifts specified in formulae for dotal charters include things such as farmsteads, fields, vineyards and cattle.

<sup>7</sup> *Cod. Theod.* 3.5.6 (*Brev.* 3.5.5).

<sup>8</sup> See Ritzer, *Le mariage* (1970), pp. 301–2.

<sup>9</sup> Turon, app. 2, *MGH Form.*, pp. 163–64: “Dum multorum habetur percognitum, qualiter ego aliqua femina aut puella nomine illa, filia illius, per consensu vel voluntate parentum vel amicorum nosterum eam legibus sponsare volo et, Christo propitio, sicut mos est et antiqua fuit consuetudo, ad legitimum matrimonium vel coniugium sociare cupio, propterea placuit mihi, atque bona decrevit voluntas pro amore vel dilectione ipsius feminae, ut ante die nuptiarum per hanc titulum osculum intercedentis haec die praesente aliquid de rebus meis ei condonare vel conferre deberem; quod ita et mihi placuit fecisse. Dono tibi, dilecta sponsa mea illa. . . .” Cf. Extr. I.9 and I.10, *ibid.*, p. 539, in which the *osculum* seems to denote both the ceremonial kiss (“osculum intercedente,” etc.) and the deed of gift itself (“per hunc osculum a die presente tibi trado;” “qui contra hunc osculum aliquid agere”).

<sup>10</sup> *Pactus Legis Salicae* 70, *MGH Leges* 4.1, p. 234: “Si quis filiam alienam ad coniugium quaesierit praesentibus suis et puellae parentibus. . . .” The phrase in (my) italics does not occur in the version of the law in the *Lex Salica* (E 96, *MGH Leges* 4.2, p. 169).

<sup>11</sup> *Historia Francorum* X.16, *MGH Script. Rer. Mer.* 1.1 (editio altera, 1937–51), p. 506.

<sup>12</sup> Sang. misc. 18, *MGH Form.*, p. 388: “Ego N., cum filia N. . . . in coniugium



Many of the surviving Merovingian and Carolingian dotal charters pertain to Roman law. Some charters say that the proceedings are *secundum legem Romanum*;<sup>15</sup> others cite the Theodosian code by name or quote its laws;<sup>16</sup> and some suggest a Roman context by echoes of Roman terminology.<sup>17</sup> Three of the Frankish charters in Zeumer's collection, however, adhere explicitly to Salic law.<sup>18</sup>

These deeds of gift, both Roman and Salic, usually place themselves in some sense between the betrothal and the wedding. The *sponsus* confirms that the betrothal has taken place and looks forward to the day of the nuptials. Dotation seems to be a necessary confirmation of the betrothal.<sup>19</sup> The gift is sometimes said to take effect immediately<sup>20</sup> and sometimes in the future, at the time of the wedding.<sup>21</sup> In some cases, the charter appears to confirm and fulfil a previous agreement, allowing for gifts to be added to what has already been promised.<sup>22</sup> In the Salic charters, the *sponsus*, addressing the *sponsa*, records how, with the agreement of their peers and *parentes*, they have become betrothed with the payment of a

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accipere, parentibus et cognatis nostris consentientibus, decrevissem. . . ." Turon. app. 2, pp. 163–64: "per consensu vel voluntate parentum vel amicorum nostrorum eam legibus sponsare volo. . . ." Cf. Aug. B 24 (from Reichenau, citing the *Lex Alamannorum*), p. 357: "ego fabram tuam . . . pro conventu parentorum nostrorum ex utraque parte accepissem." *Conc. Triburiense* (AD 895) 39, *MGH Capit.* 2, p. 235: "... Francus mulierem Baioaricam, utrumque consultu propinquorum legitime . . . in coniugium duxerit."

<sup>13</sup> See Ganshof, "Le statut de la femme," Société Jean Bodin, *Receuil* 12, p. 26, n.62; *Lex Rib.* 41.2, *MGH Leges* 3.2, p. 95.

<sup>14</sup> Gregory of Tours, *Historia Francorum* IX.20, *MGH Script. Rer. Mer.* 1.1 (editio altera, 1937–51), p. 437: "tam in dote quam in morganegyba, hoc est in matutinalo donum." The two prestations lumped together here were probably no longer distinguishable.

<sup>15</sup> E.g. And. 40 and 54 (*MGH Form.*, pp. 17–18 and 23); Tur. 15 (p. 143).

<sup>16</sup> E.g. Marc. II.15 (p. 85); Tur. 14 (pp. 142–43); Tur. app. 2 (pp. 163–64).

<sup>17</sup> E.g. the echo of *sponsalicia largitas* in And. 1c, p. 5, lines 4–5: "tam pro sponsalicia quam pro largitate tuae."

<sup>18</sup> I.e. Merk. 15 (pp. 246–47); Big. 6 (p. 230) and Lind. 7 (pp. 271–72). Note also C. Sang. 18 (pp. 406–7), which refers explicitly to Alamannic law (as does the Alamannic formula Aug. B 24, p. 357–58).

<sup>19</sup> See, for example, Tur. 14, p. 142: "Dum multorum habetur percognitum, quod ego te illa, una cum consensu parentum vel amicorum nostrorum, tua spontanea voluntate *sponsavi*, mihi placuit, ut aliquid de rebus meis per hunc titulum libelli dotis *ante dies nuptiarum* tibi confirmare *deberem*; quod ita et feci."

<sup>20</sup> E.g. Sen. 25 (p. 196).

<sup>21</sup> Tur. 14 and 15 (pp. 142–43); Merk. 15 (p. 246); Big. 6 (p. 230); Lind. 7 (pp. 271–72).

<sup>22</sup> E.g. Tur. app. 3 (p. 164).

solidus and denarius, in accordance with Salic law. He records also that he has agreed to confer something as her dowry, and accordingly does so now, by means of this dotal charter. The gift is then itemized. The woman is to have and to hold the specified gift from the day of the nuptials, when God will join them together.<sup>23</sup>

The timing of the dotation—whether it took place on the occasion of the betrothal or subsequently, or even at the wedding—is often difficult to determine. It is possible that in accordance with Roman practice, dotation often took place shortly before or at the time of the conclusion of the marriage, gifts such as the *arrha* or the Salic solidus and denarius having been used to establish that the partners were betrothed. But the effect of dotation was to confirm the betrothal. Once a woman had been betrothed (*desponsata*) and endowed (*dotata*) in accordance with the law, it only remained for her to be given to her husband.<sup>24</sup>

Insofar as we have any evidence regarding the nuptial process in this period, it probably pertains exclusively to the nobility, but even this evidence is slight. There were no sociologists or anthropologists in the Carolingian world, and no-one took the trouble to record for us precisely by what means or stages a man and a woman became married. Authors assumed that their readers knew what the customary procedures were. Most of the references to the nuptial process that have survived are simply statements as to what conditions should be satisfied if one is securely to establish the validity of a marriage. Hincmar, for example, says that “no-one should doubt that, in accordance with sacred authority, a woman who has been legitimately betrothed [*desponsata*], endowed [*dotata*] and honoured with public nuptials is a wife.”<sup>25</sup> The formula echoes Leo’s letter to Rusticus, in which the Pope concludes that a man’s servile concubine is not his wife “unless perchance it is known that the woman has been made free, legitimately endowed and

<sup>23</sup> Lind. 7, pp. 271–72.

<sup>24</sup> Cf. *Iudicia Conc. Tribur.* (AD 895) 5, *MGH Capit.* 2, p. 207: “Quidam desponsavit uxorem et dotavit, cum illa vero coire non potuit;” Ben. Lev. III.179, *PL* 97:820B: “tunc . . . eam sponsare et legitime dotare debet;” Ben. Lev. III.463, *PL* 97:859C: “uxor petatur, et a parentibus propinquioribus sponsetur et legibus dotetur.”

<sup>25</sup> *De divortio Lotharii et Tetbergae*, *PL* 125:708A: “Et secundum sacram auctoritatem, legaliter desponsatam, dotatam, et publicis nuptiis honoratam, uxorem esse nemo qui dubitet.”

honoured by public nuptials [*publicis nuptiis honestata*].”<sup>26</sup> Hincmar considered that these three requirements (betrothal, dotation and public nuptials) applied to all women, and not only to those who had been bondwomen before their marriage.<sup>27</sup>

The forged decretals provide glimpses of customary procedures. The account of the nuptial process given by ps.-Evaristus, in a passage that Hincmar cites as authentic, is as follows.<sup>28</sup> First, the suitor petitions those who have power over the woman and those who are her guardians. Second, she is promised in marriage (*sponsetur*) by her family. Third, she is “legitimately endowed.” Fourth, when she has become of age (*suo tempore*), a priest blesses her with prayers and oblations, and with *paranymphae* (or perhaps *paranymphe*) and members of her family in attendance. Fifth, the man asks for her at the appropriate time (*tempore congruo*), her family give her to him in accordance with the law, and he solemnly receives her. Finally, the couple remain continent for two or three nights, devoting themselves to prayer, before consummating their marriage.

How far this text can be relied upon is uncertain, for it is a forgery and seems to have been compiled from more than one source. It is also somewhat idealistic. As it stands, it seems to posit a sequence of five stages: petition, betrothal, dotation, benediction, *deductio* and finally consummation. Dotation is associated rather with betrothal than with marriage, and the conjugal liturgy takes place some time before the spouses begin to live together (so that it is strictly not a nuptial liturgy but a religious confirmation of the betrothal). In the early Middle Ages, however, the nuptial liturgy is usually the religious celebration of the man’s “leading” (*deductio* or *ductio*) of his betrothed. Having been betrothed and endowed, the bride is “led with public nuptials.”<sup>29</sup>

Hincmar was probably the author of splendid nuptial liturgy for Judith, daughter of Charles the Bald, and Ethelwulf, King of the Angles.<sup>30</sup> The sequence of benedictions begins with a prayer that God should bless the dotal gifts (“benedic, Domine,

<sup>26</sup> *Epist.* 167, *inquisitio* 4, *PL* 54:1205A.

<sup>27</sup> *De divortio*, *PL* 125:734B.

<sup>28</sup> Ps.-Evaristus, *PL* 130:81B–C. Hincmar, *De divortio*, *PL* 125:649A–B. See also Ben. Lev. III.463, *PL* 97:859C–D.

<sup>29</sup> E.g. Hincmar, *Epist.* 136, *MGH Epist.* 8, p. 97: “si vir mulieri desponsatae, dotatae ac publicis nuptiis ductae secundum apostolum debitum coniugale non potuerit reddere...”

<sup>30</sup> *MGH Capit.* 2, p. 426.

has dotes"). Second, the priest blesses the ring, and this is conferred (perhaps by the groom) as a sign of love and indissoluble union, for man should not separate what God has joined together. Third, the minister marries the woman as a chaste virgin and future wife to a single man ("despondeo te uni viro virginem castam atque pudicam, futuram coniugem"), and exhorts the woman to follow the example of holy women such as Sarah, Rachel, Ester, Judith, Anna and Naomi. Finally, the priest blesses the couple and their marriage. The blessing of the bride as queen and her coronation follow.

This occasion was unusual, and one should not regard the nuptial liturgy recorded here as representative for its time. It may be noted that the verb *despondere* in this text means "to espouse" or "to marry," in the sense in which a third party marries the couple. Similarly, a dotal charter says that God "married [*desponsaverit*] one woman, not several, to the first man;" and again that God "married [*despondit*] one virgin to one man" (namely Adam).<sup>31</sup> The verbs *despondere* and *desponsare* have come to denote a priest's confirmation of the betrothal.

The case of Count Stephen of Auvergne is unusually revealing because the normal nuptial process was obstructed twice. According to the deposition he made to the Council of Tusey in AD 860,<sup>32</sup> Stephen, with the consent of his kinsfolk, had asked the girl's father for her hand in marriage, and had betrothed her in accordance with the law ("una cum consensu parentum et amicorum meorum . . . filiam . . . legaliter petii et optentam legaliter desponsavi"). Stephen's scruples made him unwilling to conclude the marriage ("ne sponsam meam in coniugem ducerem"), and he fled into exile. Having been forced by the girl's father, Count Raymond of Toulouse, to return and to conclude the arrangements, he endowed her and accepted her with public nuptials ("dotavi eam, et publicis nuptiis honoratam accepi"). He still refused to consummate the marriage. This story and Hincmar's reflections upon it indicate that the nuptial process comprised four stages: betrothal; dotation; *deductio* with public nuptials (including priestly benediction); and finally consummation.

The rescript addressed by Nicholas I in AD 866 to Bulgarians who had converted to the Church of Rome contains a

<sup>31</sup> Extr.I.13, *MGH Form.*, p. 542.

<sup>32</sup> As reported by Hincmar, *Epist.* 136, *MGH Epist.* 8 (*Epist. Kar. Aevi* 6), p. 89.

unique description of the normal stages by which one contracted marriage.<sup>33</sup> Whereas patristic and medieval authors usually assumed that the reader was familiar with these stages, Nicholas did not, for his aim was to give some general account of Western customs to persons who were not familiar with them. These customs differed considerably from the Eastern ones known to the Bulgarians, but the process that Nicholas depicts seems to be essentially the same as that envisaged by Hincmar. It begins with the betrothal (*sponsalia*), which Nicholas defines as a compact in which the parties agree to a future marriage.<sup>34</sup> The betrothal requires the consent both of those who are contracting it and of those in whose power they are. This formula comes from a dictum of the classical jurist Paul (*Dig.* 23.2.2), but whereas in Paul (and likewise in the *Digest*) these are criteria for the validity of marriage, Nicholas applies them to betrothal.

Second, the *sponsus* betroths (*desponderit*) the *sponsa* to himself by placing on her finger a ring as *arrha* and as a symbol of fidelity. This seems to have happened after the contracting of the initial betrothal. The action may have provided a means for the *sponsus* and *sponsa* to confirm their consent to an arrangement that had been made in their infancy (although even the conferring of the ring may have taken place before they reached marriageable age). The gift of the *arrha*, if this interpretation is correct, would have been in effect a compact between the spouses themselves rather than between their respective families.

Third, the *sponsus* confers whatever dowry may be agreed upon. He does this by means of a written contract and in the presence of witnesses appointed by both sides.

Fourth, the *sponsus* and *sponsa* are conducted (*perducuntur*) to the nuptials (*nuptialia foedera*). This may take place soon after the other elements, but if these took place when the partners were still minors, the nuptials do not take place until the partners have reached the minimum age determined by the Church for marriage. They are led into a church with oblations, which they offer up to God, and the priest blesses and veils them. This commemorates God's blessing of Adam

<sup>33</sup> Nicholas, *Epist.* 99 (*Ad consulta Bulgarorum*), 3, *MGH Epist.* 6 (*Epist. Kar. Aevi* 4), pp. 570–71.

<sup>34</sup> "... sponsalia, quae futurarum sunt nuptiarum promissa foedera. . . ." Cf. *Dig.* 23.1.1 and *Inst.* 1.10.pr.

and Eve in Paradise, when he said, "Be fruitful and multiply." Those marrying for the second time (that is, after widowhood) do not receive the veil. After the wedding, the spouses go out from the church wearing garlands or crowns (*coronae*) that are reserved there. The partners are thereby directed to lead an "undivided life"<sup>35</sup> with God's help. Here the nuptials mark the husband's *ductio* of his wife.

### *Carolingian reforms*

The Carolingian rulers and the Frankish Church together tried to ensure that persons (or at least noble persons) became married in a regular and public manner and that ministers of the Church were involved in the proceedings. First, they tried to suppress or at least ameliorate the custom recognized under Germanic law whereby a man who had abducted a woman would subsequently settle with her family and regularize the union, and in that way become legitimately married to her. Second, they tried to make sure that persons became married by means of a formal and public procedure that the Church would administer. In other words, they tried to make sure that marriages were contracted *in facie ecclesiae* (although that phrase did not become current until the high Middle Ages). We shall consider each of these reforms in turn.

### *Abduction*

One of the peculiarities of Germanic law, as we have seen, was its provision for regularizing alliances that had been created by abduction.<sup>36</sup> The gist of this matter is as follows. According to the Theodosian code, an abductor could not come to an agreement with the woman and her *parentes* and thereby keep her. Moreover, if the woman went with the abductor of her own accord, she thereby participated in his crime (*Cod. Theod.* 9.24). Germanic law, on the contrary, distinguished between elopement (in which the woman chose to run off with a man) and abduction (in which someone carried her off unwilling). Moreover, while abduction was a serious crime, the abductor could settle the matter by compensation. He could

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<sup>35</sup> "... individuum vitam..." Cf. *Inst.* 1.9.1.: "Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens."

<sup>36</sup> See above, pp. 101–08.

then regularize the alliance and turn it into legitimate marriage by means of dotation and agreement. In effect, a retrospective betrothal took place.<sup>37</sup> While some aspects of the Germanic position may have come from Roman vulgar law, the practice of settling by composition was characteristically Germanic.

The Frankish Church, from the Merovingian period, was opposed to the Germanic accommodation of abduction. Moreover, abduction was usually conceived as *raptus in parentes*, as it had been in imperial Roman law. The consent of the woman did not mitigate the crime but rather made her a party to it, and there was no distinction between elopement and abduction. The Council of Orléans of 511 dealt with the matter of the abductor who evaded vengeance by fleeing to a church with his woman and taking sanctuary there. The woman is to be separated from the abductor and returned to her father even if she was abducted willingly or has consented to it after the event. Although the abductor's life should be spared because he took sanctuary, he becomes a slave unless he can pay sufficient compensation to emancipate himself. If the woman has consented, she too is guilty, although the fact that she took sanctuary gives her impunity.<sup>38</sup>

The Merovingian kings were supposed to have prohibited any man from marrying a girl or a widow without the consent of her *parentes*.<sup>39</sup> A king might allow a man to marry a girl without the consent of her *parentes* as a royal boon, but the Council of Orléans of AD 541 prohibited this practice on pain of excommunication. The bishops declared that by marrying a girl in this way, impiously disregarding the will of her *parentes*, those involved made marriage into a kind of captivity.<sup>40</sup>

<sup>37</sup> *Lex Gund.* 12.1–2, *MGH Leges* 2.1, p. 51; *Lex Baiuvariorum* 8.3–7, *MGH Leges* 5.2, pp. 355–57; *Lex Vis.* 3.3.7, *MGH Leges* 1, p. 142; *Leges Langobardorum*, Rothair 186–87, *MGH Leges* (folio) 4, pp. 44–45; Rothair 190–91, pp. 45–46 (where another man's *sponsa* is abducted); *Lex Saxonum* 49, *MGH Leges* (folio) 5, p. 74; *Lex Alam.* 50.1, *MGH Leges* 5.1, p. 109 (where the woman is married) and 51, p. 110 (where a *sponsa* is abducted).

<sup>38</sup> *Conc. Aurelianense* AD 511, 2, *CCL* 148A, p. 5.

<sup>39</sup> *Conc. Turonense* AD 567, 21 (20), *CCL* 148A, p. 187: "... cum non solum domni gloriosae memoriae Childebertus et Chlotcharius reges constitutionem legum de hac re custodierint et seruauerint, quam nunc domnus Charibertus rex successor eorum praecepto suo roborauit, ut nullus ullam nec puellam nec uiduam absque parentum uoluntatem trahere aut accipere praesumat."

<sup>40</sup> *Conc. Aurelianense* AD 541, 22, *CCL* 148A, pp. 137–38. See also *Conc. Parisiense* AD 556–73, 6, *ibid.*, p. 208: "Nullus uiduam neque filiam alterius extra uoluntatem parentum aut rapere praesumat aut regis beneficio estimet

Gregory of Tours recalls one attempt to annul a marriage on the grounds that the man did not have the agreement of the woman's *parentes*. A woman called Ingiltrude, who had founded an abbey, asked her daughter Berthegund, who was already married, to leave her husband and children and to enter the abbey. This her daughter did, on the grounds that no person joined in marriage would see the kingdom of God. Having been informed of the matter by the husband, Gregory himself went to the abbey and pointed out to Berthegund that the Church had condemned the practice of leaving a husband on these grounds and in this way. Fearing excommunication, Berthegund returned to her husband. At a later stage in the affair, Berthegund's brother, who was Bishop of Bordeaux, became involved. This bishop claimed that Berthegund's marriage was invalid because she had been married without the agreement of her *parentes*. Gregory comments that by this time they had been married for nearly thirty years.<sup>41</sup>

It is impossible to ascertain the intention behind this laconic observation, which one might interpret in any one of at least three ways. Gregory might have considered their having lived together as man and wife to be sufficient *ipso facto* to establish that they were married, whether or not there had been parental agreement. Again, he might have been expressing scepticism about the facts of the case: if there had been no parental consent, why had the parents not objected before? He might also have wished to argue that to tolerate a marriage for many years was in effect to consent to it.

Since the Carolingian reformers sought to introduce Romano-Christian norms, they regarded abduction as a barbarian practice that deserved to be suppressed. Nevertheless, some rulings from this period betray a degree of vacillation and show that the Church was willing to compromise. A capitulary of Louis the Pious, issued between 818 and 819, accepts the traditional Germanic system of composition. The ruling concerns the more complicated case of a woman who, having been betrothed to one man, is abducted by another. The abductor must pay the appropriate compensation both to her *sponsus* and to her father,

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postulandum. Quod si fecerit, similiter ab ecclesiae communione remotus anathematis damnatione plectatur."

<sup>41</sup> *Historia Francorum* IX.33, *MGH Scrip. Rer. Mer.* 1.1 (editio altera, 1937-51), p. 453: "Prosequenti igitur viro eius dicebat [Berthchramnus], quia: 'sine consilio parentum eam coniugio copolasti; non erit uxor tua.' Erant enim iam fere XXX anni, ex quo coniuncti pariter fuerant."



and must pay in addition a fine of 60 solidi to the king. If he does not do this, he is to be exiled and he cannot marry the woman.<sup>42</sup> (I presume that he would have been able to marry her if he paid composition.) Another capitulary from the same period shows that Louis later reconsidered the matter, and attempted to make the laws conform with the Councils of Chalcedon and Ancyra.<sup>43</sup> The practice of getting wives by abduction is evil not only according to human law but also according to divine law (cap. 22). An abductor must be anathematized. There is no way in which the alliance can become a legitimate marriage (cap. 23). The decree cites the eleventh canon of the Council of Ancyra (314), according to which girls who have been betrothed and have been abducted by others are to be returned to their fiancés, even if they have been used violently (that is, raped) by their abductors.<sup>44</sup> If the woman marries her abductor, both should be anathematized. If the woman has not consented to her abduction, her *sponsus* can still marry her if he wishes, but if she consented, she is subject to the same penalty as her abductor (cap. 24). Here Romano-Christian norms had replaced Germanic ones. Was Louis the instigator of this reform?

These rulings were reconsidered at Meaux in 845, in the course of the Council of Meaux and Paris.<sup>45</sup> A compromise was reached. The council permitted the practice of settlement and marriage after abduction, but only as a concession to human weakness. At the same time, it exhorted against the practice and ruled that persons who acted in this way should do penance. The previous ruling against the abduction of betrothed women was to be generally retained (cap. 68), but if an abductor had come to an agreement with the woman's *parentes*, the marriage should be allowed to stand. One capitulum (cap. 64) refers to men who have abducted maidens or widows but who have afterwards married them by obtaining the agreement of the *parentes* and bestowing dowries, as if they had been

<sup>42</sup> *Capitula legibus adenda* (818–19), cap. 9, *MGH Capit* 1, p. 282.

<sup>43</sup> *Capitulare ecclesiasticum* (818–19), capp. 22 and ff., *ibid.*, pp. 278–79.

<sup>44</sup> Cap. 24, p. 279: "Disponsatas puellas et post ab aliis raptas placuit erui et eis reddi quibus ante fuerant disponsatæ, et imasi ei[s] a raptoribus vis inlata constiterit." For the source (Ancyra, can. 11), see R. B. Rackham, "The text of the canons of Ancyra," *Studia Biblica et Ecclesiastica* 3 (1891), p. 149; Mansi 2, col. 517; Hefele-Leclercq, vol. 1.1, p. 313. The text is quoted by Gratian C. 27 q.2 c.46 (1076).

<sup>45</sup> *Conc. Meldense-Parisiense* (845–46), capp. 64 ff., *MGH Capit* 2, pp. 413–14.

betrothed to the women concerned.<sup>46</sup> Men who had married in this way were to undergo public penance, and even when the penance was fulfilled, they were to defer married life for as long as they could, with the consent of the other parties, and devote themselves instead to good works. Any children born of the abominable union (*vituperabilis coniunctio*) that existed before the couple became married could not hold office in the Church. The same applied to children born after the couple became married, unless perhaps their appointment was justified either by great need on the Church's part or by great merit on the part of the offspring. If the abductor had not been able to settle the matter by agreement and dotation, the girl was to be returned to her *parentes* and the abductor still had to undergo public penance. But after his penance, the man and woman might marry, as a concession to incontinence, if there was agreement on both sides (cap. 65).

The most famous case of *raptus in parentes* among the Franks was the affair of Judith (daughter of Charles the Bald) and Count Baldwin of Flanders. Having returned from England as a widow, Judith was under the regal and paternal guardianship of Charles and in the care of the Church. If she had proved unable to remain continent, Hincmar of Reims tells us, she would have been able to marry again legitimately, in accordance with the concession of St Paul.<sup>47</sup> In fact she eloped with Baldwin.<sup>48</sup> The various reports of the affair that have come down to us—from Charles, Hincmar and Pope Nicholas I—reveal that, while she went willingly, Baldwin was considered to have abducted or “stolen” her.<sup>49</sup> As in the tradition of Roman law, elopement was not distinguished from abduction. They are

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<sup>46</sup> Cap. 64, *ibid.*: “Raptore virginum et viduarum, qui etiam postea voluntate parentum eas quasi desponsantes [i.e. desponsatas?] sub dotalicii nomine in coniugium duxerunt, publicae penitentiae subigantur. . . .”

<sup>47</sup> *Annales Bertiniani*, AD 862, *MGH Scriptores* (folio) 1, p. 456, lines 15 ff.: “sub tuitione paterna et regia atque episcopali custodia servabatur, donec, si se continere non posset, secundum apostolum, scilicet competenter ac legaliter, nuberet. . . .”

<sup>48</sup> Charles himself stated: “Filiam nostram Iudith viduam secundum leges divinas et mundanas sub tuitione ecclesiastica et regio mundeburde consitutam Balduinus sibi furatus est in uxorem” (*MGH Capit.* 2, p. 160, lines 30–32).

<sup>49</sup> Nicholas to Charles in AD 862: “Balduinus . . . qui vestram se habere indignationem, eo quod Iudith filiam vestram . . . sine voluntatis consensu in coniugium elegerit eamque volentem acceperit, ore proprio retulit” (*MGH Epist.* 6 [*Epist. Kar. Aevi* 4], p. 272). Nicholas to Judith's mother, Irmintrude in AD 862: “hinc Balduinus . . . carissimam filiam vestram contra divinarum legum sanciones rapuit. . . .” (*ibid.*, p. 274). And to Charles again, in AD

said to have married, although the marriage was probably illegitimate. Charles saw to it both that the Church excommunicated Baldwin and that the civil authorities condemned him. Any person in the kingdom who found him should not give him refuge but rather return him to undergo the appropriate penance.

In due course, Baldwin successfully appealed to Pope Nicholas, who interceded for him. Nicholas beseeched the king, but did not command him, to forgive the couple and to hand over his daughter formally as Baldwin's wife. He insisted that this was legally permissible.<sup>50</sup> Hincmar was prepared to accept that the marriage should be legitimized, but not that the miscreants should get off scot-free. In his view, a period of penance was necessary to satisfy for the injuries done to the Church, and they should do whatever civil law demanded of them.<sup>51</sup> He relented only after Nicholas threatened to excommunicate him. The couple were formally married, although Charles himself did not deign to be present at their betrothal and nuptials.<sup>52</sup>

Despite the hard line taken by the Carolingian reformers, the principle of concession, as we have seen, permitted a milder position to be maintained. Although the abductor *ought* not to keep the woman, and indeed *deserved* to be put to death in revenge by the woman's family, he could appeal to them for clemency. The Christian doctrine of marriage did not of itself demand that an abductor might not keep his woman if the latter and her *parentes* were willing to agree to this. The Church could sometimes be broadminded enough concede that a man might regularize an abduction in the Germanic matter. The process of composition and regularization would then amount to a kind of retrospective betrothal, whereby an abductor obtained parental consent and bestowed a dowry upon the woman whom he had already taken.

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863: "Balduinum . . . qui natam vestram sibi furto in uxorem contra fas sociavit . . ." (*ibid.*, p. 369). Hincmar, *Annales Bertiniani*, AD 862, *MGH Scriptores* (folio) 1, p. 456: "Iudith, quae cum fure cucurrit et adulteri portionem se fecit . . ."

<sup>50</sup> Nicholas to the Council of Soissons (AD 863): "nossemus, quod filius noster Karolus gloriosus rex legaliter posset ei, si vellet, et filiam suam in uxorem dimittere et misericordiae suae gratiam impertire, tamen non iussa misimus, sed preces optulimus" (*MGH Epist.* 6, p. 36). See also Nicholas's letter to Charles in the same year, *ibid.*, p. 369, lines 33–36.

<sup>51</sup> Hincmar, *Epist.* 169 (to Nicholas, AD 864), *MGH Epist.* 8.1 (*Epist. Kar. Aevi* 6), p. 145.

<sup>52</sup> *Ibid.*, p. 146.

An accommodation of this kind is evident in three extant versions of a Frankish formula for a letter of composition to be used by an abductor. The formula is a specially adapted dotal charter. The abductor admits to his crime, and says that both the girl herself and her *parentes* were unwilling. (The case envisaged was abduction as understood in Germanic law, and not *raptus in parentes*.) He admits also that he deserved to die, but adds that he has come to an agreement with the woman's family and hereby bestows upon the woman as her dowry what he would have bestowed if there had been a formal betrothal.<sup>53</sup>

Benedictus Levita, in the mid ninth century, maintains the strict position, affirming that an abductor can never marry the woman whom he has abducted, even if he has endowed her and come to an agreement with her *parentes*.<sup>54</sup> Hincmar of Reims, in a treatise against abduction, provides an accurate and comprehensive summary of the relevant laws in the Theodosian code (which came to him via the *Breviary*). Under Roman law, he explains, not only abductors but also the women they abduct, if they have consented before or after their abduction, must pay the ultimate price. Moreover, a woman may be guilty because she had put herself at risk or because she failed to call for help. Here Hincmar notes a parallel in Deuteronomy 22:23–24, according to which a betrothed virgin who has had sex with another man in the city may be stoned for adultery along with her violator on the ground that she did not cry out. These civil laws meet with Hincmar's approval, for he considers them to be theologically sound. God himself joined Adam and Eve and confirmed their union with his blessing, and we re-enact this in the nuptial liturgy of the Church. Even the pagans, who know nothing of God, protect by their laws what Hincmar calls the *honesta et religiosa coniunctio* of marriage. Since marriage pertains to peace, charity and concord, it cannot be licitly formed by means of discord, violence and impiety.<sup>55</sup>

We see here that like Leo I (in his treatment of concubinage), Hincmar adopted the position of Roman law but gave it a specifically Christian, theological explanation. But there are differences between the two cases. First, Hincmar, unlike Leo,

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<sup>53</sup> Marc. II.16, Tur. 16 and Merk. 19 (*MGH Form.*, pp. 85–86, 143–44 and 248).

<sup>54</sup> Ben. Lev. III.395 and II.96 (*PL* 97:848 and 761).

<sup>55</sup> *De coercendo et exstirpando raptu* 5, *PL* 125:1020D–1021A.

appealed explicitly to Roman law, which by this time was no longer the infidels' *lex humana* but rather an ancient and providentially civilizing tradition to which the Church adhered. Charlemagne had revived and christened the idea of the Roman Empire. Second, Hincmar's Christian accommodation of Roman law was more convincing. The position of the Theodosian code on abduction really is remarkably similar to that of Deuteronomy.

*Ecclesiastical marriage*

The Frankish Church prohibited clandestine marriage in the Carolingian period. Some influential churchmen, including Hincmar of Reims, even insisted that men should take their wives with "public nuptials" and priestly benediction. This movement of reform diverged considerably from the Roman law of the Theodosian code, and even from that of Justinian, although he too was inclined to demand documentation and publicity where members of the higher social orders were concerned. It was in the Church's interests to ensure that the contracting of marriage was public and that her ministers were involved. Only in this way could the Church make effective her own insistence on the permanence and exclusivity of marriage and her prohibition of marriage within certain degrees of relationship. The position represented by Hincmar was the final consolidation of a tradition that went back at least to the seventh century.

In the seventh century, the Visigothic king Ervig had ruled that no marriage should take place without a dowry because dotal documentation provided evidence of the marriage.<sup>56</sup> Ervig also required that (baptized) Jews should marry with written dowries and in church, and we may presume that his intention was to make them conform to Christian norms.<sup>57</sup> The *Collectio canonum Hibernensis*, composed in the late seventh century, preserved from Leo's letter to Rusticus of Narbonne (a text which it mistakenly ascribed to a Synod of Narbonne) the requirement that there should be public nuptials.<sup>58</sup> This source became influential on the Continent during the eighth century.

In AD 755, the Council of Verneuil, convened under Pepin the Short, ruled that all lay persons, whether noble or not,

<sup>56</sup> *Lex Vis.* 3.1.9 (*MGH Leges* 1, pp. 131–32).

<sup>57</sup> *Lex Vis.* 12.3.8 (p. 436).

<sup>58</sup> See K. Ritzer, *Le mariage* (1970), pp. 319–20.

should marry publicly.<sup>59</sup> Other councils of the period required what was marriage *in facie ecclesiae* in all but name. A council in Bavaria held at some time between 740 and 750 required that a marriage should be preceded by an inquiry into the relationship of the couple. To this end, a priest, the *parentes* and neighbours of the couple should be informed of the proposed match. If no impediment came to light, it was with the counsel and consent of these people that the couple married.<sup>60</sup> This ruling may reflect the influence of St Boniface. The Council of Friuli (in north-eastern Italy) of AD 798 stated that marriages should not be contracted furtively or in haste but only after due consideration. After the man and woman became betrothed ("interventis pactis sponsalibus"), there should be a delay before they married that was long enough for the people to ascertain their relationship. The local priest should also be informed.<sup>61</sup>

A canon in the collection ascribed to Theodore of Canterbury, which existed in several versions and was known in the Franklands from the early eighth century, requires that a priest should say mass and bless the couple in the case of a first marriage. No doubt presuming that the bride and groom would then consummate their marriage, the canon prescribes that they should stay away from church for a thirty days and then do penance for forty days, devoting themselves to prayer, before receiving communion again.<sup>62</sup>

In AD 802, Charlemagne ruled that in order to avoid incestuous marriages, bishops, priests and senior members of the laity should conduct an inquiry into the relationship of the couple, and that a priest should then join and bless them ("et tunc cum benedictione iungantur").<sup>63</sup> Benediction had become

<sup>59</sup> *Conc. Vernense* (AD 755) 15, *MGH Capit.* 1, p. 36: "Ut omnes homines laici publicas nuptias faciant, tam nobiles quam innobiles."

<sup>60</sup> *Conc. Baiuvaricum* (AD 740–50) 12, *MGH Conc.* 2.1, p. 53.

<sup>61</sup> *Conc. Foroiuliense* (AD 798) 8, *MGH Conc.* 2.1, pp. 191–92.

<sup>62</sup> See version D., canon 34, ed. Finsterwalter, *Die Canones Theodori Cantuariensis* (1929), p. 242: "In primo coniugio debet presbiter missam agere et benedicere ambos et postea abstineant se ab ecclesia XXX diebus quibus peractis peniteant XL diebus et vacent orationi et postea communicent cum oblatione." The parallel texts are as follows: version G. (ascribed to Pope Gregory), canon 62, *ibid.*, p. 259; version Co., canon 78, *ibid.*, p. 276; and the so-called *Penitential* (i.e. version V), I.14.1, *ibid.*, p. 306. Version Co. omits the forty days of penance. See Ritzer, *Le mariage*, pp. 323–25 and 335; and C. Vogel, "Les rites de la célébration du mariage," in *Il matrimonio* (1977), pp. 433–34.

<sup>63</sup> *Capitulare missorum generale* (AD 802) 35, *MGH Capit.* 1, p. 98. See also Charlemagne's *Admonitio generalis* (AD 789) 68, *ibid.*, p. 59.

a legal requirement for valid marriage, but we do not know how effective these reforms were even among the nobility. It is unlikely that benediction became customary among the lower social orders.

The Council of Mainz in AD 852 stated that if a man had a concubine who was not betrothed to him, and if he then put her aside and took as his wife a woman who had been betrothed to him, then the latter woman was his wife. In support of this the bishops cited Leo's statement, from the letter to Rusticus, differentiating wives from concubines.<sup>64</sup> The canon presupposed that as in the Roman tradition, a man could legitimize his alliance with a concubine by means of a formal betrothal (which would have included dotation). The traditions of the Church were ambivalent regarding the status of concubinage, for the survival of the Roman practice had been met with opposite responses. The Church could either regard concubinage as impermanent, and therefore condemn it as fornication, or insist on its permanence and treat it as legitimate.<sup>65</sup>

This canon from the Council of Mainz did not provide a definition of concubinage; it merely referred to what happened in cases of concubinage. Nevertheless, the text implies that by this time the difference between a wife and a concubine was simply that the former was formally betrothed (*desponsata*) while the latter was not. A concubine, in other words, need not be servile. There is other evidence that this had become the normal view of the Frankish Church. Leo I had affirmed that a concubine did not become a wife unless she had been *emancipated*, legitimately endowed and honoured with public nuptials, for he was referring to a bondswoman. Hincmar expanded this statement by adding that the concubine was to be emancipated *if* she was servile.<sup>66</sup> Jonas of Orléans warned that the children of concubinage were illegitimate even if *both* parents were free persons.<sup>67</sup>

Curiously enough, Hincmar of Reims seems to have wanted

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<sup>64</sup> *Conc. Moguntinum* (AD 852) 12, *MGH Capit.* 2, p. 189: "De concubinis. Quodsi quislibet concubinam habuerit, quae non legitime fuit desponsata, et postea desponsatam ritae puellam duxerit abiecta concubina, habet illam, quam legitime desponsavit." Cf. Ben. Lev. III.60 (*PL* 97:807B): "De concubinis reliquendis. Non est coniugii duplicatio, quando, ancilla relicta, uxor assumitur, sed profectus est honestatis."

<sup>65</sup> See A. Esmein, *Le mariage* (1929), vol. 2, pp. 131–36.

<sup>66</sup> *De divortio Lotharii et Tetbergae*, *PL* 125:734B.

<sup>67</sup> *De inst. laicali* II.2, *PL* 106:171A.

to equate concubinage with marriage in the affair of Fulcrich, a vassal of Lothar I, who had left one woman to marry another. When Hincmar excommunicated Fulcrich, the latter appealed to Pope Leo IV, who in turn wrote to Hincmar demanding an explanation. Fulcrich reported to the Pope that the former woman had been merely his concubine, and that he had taken her only to satisfy his incontinence. When the relationship was no longer agreeable to either of them, she had entered a monastery with his consent. Still unable to contain himself, Fulcrich had taken another woman, this time as his lawful wife. He protested that Hincmar had excommunicated him without ascertaining the facts by means of a civil or ecclesiastical inquiry. The Pope protested that if Fulcrich's story was correct, he was much saddened by what had been done. He ordered Hincmar to rescind the excommunication.<sup>68</sup> If Hincmar's understanding of the facts squared with what Fulcrich had reported, his views must have altered considerably by the time he became involved in the affair of Lothar II, Waldrada and Theutberga, about a decade later. Hincmar would not allow that Lothar should dismiss his wife in order to return to his former mistress, and in his treatise on the affair, he repeatedly cites Leo's letter to Rusticus, with its firm distinction between concubinage and marriage.

The tendency to demand that persons getting married should observe all due formalities reached its zenith in the forged decretals, a body of canonical texts prepared in Northern France in the mid ninth century.<sup>69</sup> The most extensive treatment is in the collection whose author was (or assumed the name of) Benedict the Deacon (Benedictus Levita).

Four of Benedict's texts come from *Lex Visigothorum* 12.3.8, in which Ervig prohibited baptized Jews from marrying within six degrees of consanguinity and from marrying without dotation

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<sup>68</sup> MGH *Epist.* 5 (*Epist. Kar. Aevi* 3), p. 599.

<sup>69</sup> For a detailed account of the treatment of marriage in Benedictus Levita and in the Ps.-Isidorian Decretals, see Ritzer, *Le mariage*, pp. 340-50. On the influence of the forged decretals, see H. Fuhrmann, *Einfluss und Verbreitung der pseudoisidorischen Fälschungen* (3 vols, 1972, 1973 and 1974). For a brief account of the content, historical circumstances and intentions of the forgeries, see Fuhrmann, *ibid.*, vol. 1, ch. 2, esp. pp. 163-67 (on Benedictus Levita) and pp. 167-178 (on the Ps.-Isidorian Decretals). See also Fuhrmann's article "False Decretals (Pseudo-Isidorian Forgeries)" in the *New Catholic Encyclopedia*, vol. 5, 820-24. Scholars sometimes call the whole corpus the "pseudo-Isidorian forgeries," although the Ps.-Isidorian Decretals constitute one work within the corpus.



and benediction. The entire law is reproduced in a modified form in Benedict's fourth appendix, which purports to be a capitulary of Charlemagne made up of decrees from the Fathers and edicts from the Roman Emperors.<sup>70</sup> Where Ervig prohibited marriage beyond six degrees, Benedict's version prohibits it beyond seven; and where Ervig addressed the law to Jews, Benedict addresses it to Christians and Jews. The three other texts in Benedict are derived from the rubric to Ervig's law (which also appeared as the ninth canon of the Twelfth Council of Toledo).<sup>71</sup> A comparison of two of Benedict's texts with the rubric reveals the forger's craft. The rubric from the Visigothic code indicates that Jews should not marry within the forbidden degrees of consanguinity and should not marry without the blessing of a priest. Benedict's versions say that *Christians* should not marry within seven degrees of consanguinity and should not marry without the blessing of a priest if they are marrying for the first time or if they are marrying virgins:

[*Lex Vis.* 12.3.8, rubric] Ne Iudei ex propinquitatē sui sanguinis connubia ducant, et ut sine benedictione sacerdotis nubere non audeant.

[Ben. Lev. II.130] *Christiani* ex propinquitatē sui sanguinis usque ad *septimum* gradum connubia non ducant; neque sine benedictione sacerdotis, *qui ante innupti erant*, nubere audeant.

[Ben. Lev. II.408] Ne *Christiani* ex propinquitatē sui sanguinis connubia ducant, nec sine benedictione sacerdotis *cum virginibus* nubere audeant. . . .

The Jews of the rubric became Christians in Benedict's version. Moreover, Benedict qualified the precept because by this time the Frankish Church had adopted the Roman custom of refusing benediction to persons who had been previously married or who had not remained *incorrupti*.<sup>72</sup> Caesarius, Archbishop of Arles (d. 542), recorded in one sermon that it was the custom in Rome to refuse to bless the marriages of persons who had not preserved their chastity. Another sermon makes it clear that this custom had been adopted in southern Gaul, at least in Caesarius's diocese. His aim in both passages was to discourage men from taking concubines before they married.

<sup>70</sup> Add. IV.2, *PL* 97:887A–C.

<sup>71</sup> II.130 (*PL* 97:765A); II.327 (783D–784A); and II.408 (798D).

<sup>72</sup> See Ritzer, *Le mariage*, pp. 229–32.

Refusing to bless the marriages of *corrupti* provided the Church with a modest weapon against pre-marital concubinage.<sup>73</sup>

In another text, Benedict argues that just as a man expects to find his bride chaste and uncorrupted, so should he himself remain chaste and uncorrupted until he marries, so that he can marry with the blessing of a priest. The text adds, apparently as an afterthought, that he should first bind himself to the woman by means of a formal dowry.<sup>74</sup> The exclusion from benediction of persons who have not remained chaste ought to preclude the thesis that benediction is necessary for validity. Nevertheless, Benedict seems to insist on the latter thesis. Another text begins with the decree that a wife must be married legitimately to her husband and then comments that we know from the Apostles and their successors and from the Fathers that there is no legitimate marriage unless certain conditions are satisfied. Benedict then sets out these conditions. A man should acquire his wife from those who have power over her and with the agreement of her family; there should be dotation, in accordance with the law; when she is old enough, the girl should be blessed by a priest, according to custom, with prayers and oblations; and at the proper time, she should be taken to her husband, accompanied by *paranymph* (or *paranymphae*<sup>75</sup>) and by members of her family, so that he who has petitioned for her may solemnly accept her. The newlyweds should preserve their chastity and devote themselves to prayer for two or three nights (the nights of Tobias) so that they can bear good children and act in a way that is pleasing to the Lord. By doing all this, they will not only please God but will also ensure that their children are legitimate.<sup>76</sup>

A decree ascribed to Pope Evaristus in the Ps.-Isidorian Decretals reproduces this text but reinforces its message. If a couple unite in any other way than that stated above, there

<sup>73</sup> *Sermo* 42.5, SC 243, p. 306, lines 22–26; *Sermo* 43.5, *ibid.*, p. 318, lines 14–20 (or CCL 103, pp. 188 and 192). See Delage's note to the first text (SC 243, p. 307, n. 3), and Ritzer, *Le mariage*, pp. 276–77.

<sup>74</sup> Ben. Lev. III.389 (847A). Benedict's source may be Jonas of Orléans, *De inst. laicali* 2.2, PL 106:170D–171C. Note that Ben. Lev. III.388 (847A) is derived from *De inst. laicali* 2.1 (PL 106:167–69): marriage is a good created by God; one should use it for procreation and not for lust; Job is the type of the good marriage.

<sup>75</sup> "... et a paranymphis, ut consuetudo docet, custodita et sociata a proximis..." There is no way of knowing whether the word *paranymphis* refers to bridesmen (*paranymph*), to bridesmaids (*paranymphae*) or to both.

<sup>76</sup> III.463, PL 97:859C–D.

should be no doubt that their union is not legitimate marriage; rather, it is adultery, *contubernium*, fornication or indecency. Here the text adds a qualification: their marriage will not be legitimate without the aforesaid formalities unless it is supported by the agreement of the parties and by legitimate vows (“nisi voluntas propria suffragata fuerit et vota succurrerint legitima”).<sup>77</sup> Scholars have interpreted the final remark, which appears to contradict what has gone before, as a limitation or qualification of the main contention. According to Joyce, for example, the last remark shows that the formal conditions were not essential but were merely the usual grounds for presuming that a true marriage had taken place.<sup>78</sup> Ritzer suggests that the text is inconsistent and that the forger has taken the tag from some other source, perhaps from an authentic decretal to add verisimilitude.<sup>79</sup> This explanation has much to commend it, but the forger probably thought that the text made sense as a whole. Hincmar of Reims quotes the spurious decree as authoritative and ascribes it to Evaristus.<sup>80</sup>

Part of Benedictus Levita's aim was to ensure that marriages took place publicly. As we have noted, the Council of Verneuil in 755 decreed that all laymen should marry with public nuptials.<sup>81</sup> Leo's letter to Rusticus corroborated this judgment, and Leo required both dotation and public nuptials as things that distinguished marriage from concubinage and created the “nuptial mystery.” The relevant passage in Leo's letter appears in Benedictus Levita.<sup>82</sup> Although Leo was referring to the case of a servile concubine, later authors assumed that his requirements applied to any woman, whatever her status might have been.

One of Benedict's dicta declares, “Let there be no marriage without a dowry; nor should anyone presume to marry with-

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<sup>77</sup> *PL* 130.81B–C.

<sup>78</sup> *Christian marriage* (1933), p. 104.

<sup>79</sup> *Le mariage*, p. 351.

<sup>80</sup> Hincmar, *De divortio*, *PL* 125:649A–B.

<sup>81</sup> *MGH Capit.* 1, p. 36, cap. 15: “Ut omnes homines laici publicas nuptias faciant, tam nobiles quam innobiles.”

<sup>82</sup> III.105 (*PL* 97:810B–C): “Dubium non est, eam mulierem non pertinere ad matrimonium, in qua docetur nuptiale non fuisse mysterium. Igitur quicumque filiam suam viro habenti concubinam in matrimonium dederit, non ita accipiendum est, quasi eam coniugato dederit, nis forte illa mulier et ingenua facta et dotata legitime et publicis nuptiis honestata videatur. Paterno arbitrio viris iunctae carent culpa, si mulieres, quae a viris habebantur, in matrimonio non fuerunt, quia aliud est nupta, aliud concubina.” See also III.59 and III.60 (*PL* 97:807B), which come from the same source.

out public nuptials.”<sup>83</sup> The first part of the dictum—“Nullum sine dote fiat coniugium”—comes from the rubric to *Lex Visigothorum* 3.1.7 (in Ervig’s version). Another text justifies the requirement that marriages should be public by pointing out that grave errors may arise from clandestinity.<sup>84</sup> Not only may someone marry who is already betrothed or married to another person, but there is the danger of incestuous unions. The children of incest may be born blind, lame or deformed. To avoid such evils, there must be a thorough inquiry before the marriage, and the woman’s husband should receive her publicly. A priest in whose parish the marriage is to take place should meet with the people in church and ascertain whether there is any impediment of relationship, whether the woman is already another man’s *sponsa* or wife, and so on. If he finds no impediments, then with the priest’s benediction, if the woman is a virgin, and with the agreement of the priest and the people, she is betrothed and legitimately endowed. A ps.-Augustinian text is quoted to corroborate this statement.<sup>85</sup> The latter text affirms that the bride, in accordance with the law, should be chaste, legitimately endowed and married publicly. Accompanied by her *paranymphs*, she should be handed over by her *parentes* to her husband. Such are the conditions to be satisfied if a man is to take a woman lawfully (*licite*). After their marriage (Augustine is supposed to have said), the woman should not separate from her husband except for the sake of prayer. If she commits adultery, her husband may divorce her, but he cannot remarry as long as she lives.<sup>86</sup>

What is astonishing about these texts is not that they demand the fulfilment of various formalities, but that they treat all such things as necessary conditions for legitimacy. We should not be too surprised to find betrothal and dotation among the necessary conditions. This may well have been the normal position of the Frankish Church. Nor is very surprising to find public nuptials included, since the Frankish Church sometimes insisted on these. But the affirmation that benediction is nec-

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<sup>83</sup> II.133 (765A).

<sup>84</sup> III.179 (820).

<sup>85</sup> The text is from the *Collectio Hibernensis*: see Ritzer, *Le mariage*, p. 345 and p. 320, n. 361.

<sup>86</sup> See also Ben. Lev. II.87 (PL 97:760A): “Quod si quisque propriam expulerit coniugem *legitimo sibi matrimonio coniunctam*, si christianus esse recte voluerit, nulli alteri copuletur; sed aut ita permaneat, aut propriae reconcilietur coniugi.”

essary does not square easily with the denial of benediction to *corrupti* and to persons who had been married before. To declare that such trappings as the *paranymphe* are necessary is absurd. No amount of benign interpretation can make these texts from the forged decretals on the necessary conditions for marriage appear entirely coherent. Yet Hincmar of Reims endorsed the decree of ps.-Evaristus.<sup>87</sup>

One may ask whether this insistence on formality and ritual was a peculiarly Frankish or Carolingian development. On the face of things, the position represented by Pope Nicholas I in his rescript to the Bulgarian converts is strikingly different from the position of Hincmar and the forged decretals.<sup>88</sup> The nuptial process that Nicholas describes (betrothal, the gift of a ring, written dotation in the presence of witnesses, nuptials with veiling and benediction) is not significantly different from that envisaged by Hincmar, but Nicholas comments that contrary to what the Greeks may teach, he does not maintain that it is a sin to omit any of these things. Many persons are not wealthy enough to make the necessary preparations. The only thing that is essential for the legitimacy of a marriage is the agreement (*consensus*) of the spouses: “ac per hoc sufficiat secundum leges solus eorum consensus, de quorum coniunctionibus agitur.” Nicholas adds that if consent is absent, then all the other elements, even including coitus itself (“etiam cum ipso coitu”), do not suffice to create a marriage. Here he quotes the dictum “it is not coitus that makes marriage, but intent [*voluntas*],” from the *Opus imperfectum in Matthaëum*, which he ascribes to John Chrysostom.

These remarks may indicate that the Roman Church had remained true to the consensualism of Roman law while the Frankish Church insisted on formality, publicity and the nuptial liturgy. Nicholas’s testimony contains several echoes of classical Roman statements regarding marital consent, and his statement that it is no sin if any of the formalities are omitted is in marked contrast to certain sayings in Hincmar and in the forged decretals. The latter sources affirm that marriage is illegitimate if it takes place without betrothal, dotation and public nuptials.

I think that there was indeed some difference here, but its

<sup>87</sup> *De divortio*, PL 125:649A–B.

<sup>88</sup> Nicholas, *Epist.* 99 (*Ad consulta Bulgarorum*), 3, *MGH Epist.* 6 (*Epist. Kar. Aevi* 4), pp. 570–71.

nature and extent are difficult to determine. Nicholas conceded that poor people could marry without the formalities, and the Frankish statements were surely not intended to apply to poor people. Even Justinian advocated public marriage for the higher orders of society. Nevertheless, the echoes of Roman consensualism in Nicholas are striking, and there are no such echoes in the Carolingian sources. The insistence on formality, and in particular on the requirement that marriage should take place in church and with the blessing of a priest, seems to have been peculiar, as far as the Latin West goes, to the Carolingians of the ninth century.

What was the purpose of marriage *in facie ecclesiae* in the minds of the Carolingians? Whatever may have been the case in other parts of Europe, the Frankish Church seems at first to have demanded merely that a marriage should be public and should follow an inquiry. The Church administered these procedures, but the nuptial blessing was not obligatory. Under Charlemagne, however, nuptials were declared to be necessary, and both the forged decretals and Hincmar insisted upon elaborate rituals that included benediction. As we have seen, Hincmar attributed some special religious significance to the benediction, and maintained that the spouses normally became bound to one another at this point. In his view, it seems, God joined the couple when the priest blessed them. At this place and time, the Western conception of marriage veered for a while towards that of the East. Nevertheless, even the advocates of this position undermined it by maintaining that only those who had preserved their chastity and who were marrying for the first time could receive the blessing.

Despite these reforms, the formation of marriage probably remained, even among the nobility, a largely secular and private business. Helmholz concludes from his study of marriage litigation in late medieval England that "the contract which created the marriage bond remained, as it had been in the early Middle Ages, a private act. It was done outside the glare of village publicity and quite apart from the direction of the Church."<sup>89</sup> It is clear that in this later period, couples often got married without involving the clergy at all. While it is possible that in many cases of privately contracted marriage, the Church later solemnized the union, the evidence suggests that people considered the contracting of marriage to be some-

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<sup>89</sup> *Marriage Litigation in Medieval England* (1974), p. 30.

thing essentially domestic: a matter for the spouses and their families, or even for the spouses alone. People took a lot of convincing that they ought to contract marriage *in facie ecclesiae*. There was nothing new about this view of marriage. It had existed before the Carolingian reforms, and it survived their efforts as well.

The Carolingian reformers' insistence upon marriage *in facie ecclesiae* and upon the importance of the nuptial liturgy does not seem to have fundamentally changed the criteria for legitimate marriage. A marriage was valid, in other words, if the woman was betrothed and endowed (*desponsata et dotata*) in accordance with the law (that is, provided that there were no impediments and that the relevant consents have been given).<sup>90</sup>

Some indication as to the attitudes that prevailed in the tenth century is provided by Hucbald's account of the marriage of Adalbald to St Rictrude, respectively a Frankish nobleman and a woman from a wealthy Gascon family. Hucbald died in about AD 930. (Rictrude had died in AD 688.)<sup>91</sup> Hucbald's aim was to present the reader with a model marriage, and some of what he says he deduced *a priori*, as it were, from the premise that whatever ought to be true of marriage must have been true in their case. Hucbald tells us that Adalbald's reason for marrying was not incontinence but to beget and to cherish children. As was customary, she chose him for his strength, breeding, handsomeness and wisdom, while he chose her for her beauty, breeding, wealth and good behaviour. Hucbald did not obtain these criteria from biographical research but from Isidore's *Etymologies*.<sup>92</sup> Their marriage was honourable and their marriage bed undefiled (Heb. 13:4). They were mindful that their bodies were temples of the Holy Spirit (1 Cor. 6:19–20). United in faith and charity they became two in one flesh. They were one in mind, one in word and one in deed, serving God the Father and Jesus Christ all the days of their life. In accordance with Genesis 1:28, God blessed them with children, all five of whom, being raised with due care, received the blessing of heaven, so that every one of them became a religious.

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<sup>90</sup> Cf. *Iudicia Conc. Tribur.* (AD 895) 5, *MGH Capit.* 2, p. 207: "Quidam desponsavit uxorem et dotavit, cum illa vero coire non potuit;" and *Conc. Tribur.* c. 41, *ibid.*, p. 237 (referring to the same case); "Si quis legitimam duxerit uxorem."

<sup>91</sup> *Vita sanctae Rictrudis* 5–6, *PL* 132:834A–D.

<sup>92</sup> *Etym.* IX.7.28–29, ed. Reydellet, pp. 237–38.

How did the couple *get* married? All Hucbald tells us is that Adalbald betrothed Rictrude according to custom, gave her a dowry and received her in marriage. In other words, they observed the customary secular formalities that had distinguished marriage from concubinage since Carolingian times. The *deductio* may have involved public nuptials and priestly benediction, but if so, Hucbald does not consider the matter worth mentioning.

The two reforms we have considered above were related, for the manner in which Germanic law treated abduction was not conducive to marriage *in facie ecclesiae*. As we have seen, Hincmar was at pains to show that a girl who consented to her own abduction did not mitigate the crime but rather became a party to it. (This was the position of the Theodosian code.) By implication, Hincmar ruled out elopement, in which a girl would run off with a man without her family's consent. Such marriages would in the nature of things have been clandestine and would not have followed the formal inquiry required by the Frankish Church. If an abductor came to an agreement with the girl's family, as under Germanic law, they would probably have settled the whole affair privately. The marriage would have been formed without a prior inquiry, and as *corrupti*, the partners would not have been eligible to receive the benediction. The aura of brutality, scandal, theft and indecency that surrounded abduction was not in keeping with the idea that marriage belonged in the Church.

In these reforms, we see the Church attempting to regulate and to "police" marriages, and trying thereby to make marriages conform with ecclesiastical rules and clearly to distinguish the sacred and indissoluble bond from impermanent forms of sexual alliance. At the same time, churchmen were acting on their understanding that marriage was not an entirely secular institution, but rather something that took place in the Church. Some Carolingian churchmen went a little further along this road by insisting that the priest's benediction and the nuptial liturgy had an essential role in the formation of marriage. This was a logical step, but it was not one that the Western Church was destined to follow.



## CONCLUSION

### FROM *CONSORTIUM OMNIS VITAE* TO *SACRAMENTUM MAGNUM*

The Christian principles of submission to God and of communion in the Body of Christ determined the standards of behaviour in marriage as in every other walk of life. Thus St Paul, writing to the Colossians, applied these general principles to three analogous social institutions: marriage, parenthood and slavery (Col. 3:18–4:1). The New Testament also contained specifically matrimonial teachings. Jesus' treatment of divorce in the synoptic gospels and the treatment of marriage in the fifth chapter of Ephesians set marriage apart as a specially holy condition and as a form of Christian vocation. The intrinsic potency of nuptial symbolism undoubtedly corroborated these ideas.

The Latin Fathers associated the holiness of marriage with its symbolic relation to the union between Christ and the Church. This seemed to them to be one implication of St Paul's statement about the "great sacrament" (Eph. 5:32). In their view, marriage possessed a referential holiness: that is to say, it was sacred inasmuch as it symbolized or represented the mystical marriage between the Church and Christ. Theologians did not define the relation between the two unions during the patristic and early medieval periods, and there was no consensus or consistency regarding what the word *sacramentum* in Ephesians 5:32 denoted. Nevertheless, they believed in the "sacramentality" of marriage, and they tried to find ways of articulating it.

The word "sacramentality" may invite misunderstanding here, although not in any person who has read the foregoing pages. Theologians in our period did not say that marriage was one of the seven sacraments (that was a high Medieval innovation), but they did use the word *sacramentum* to express the specially holy nature of marriage. This was especially true of Augustine. First, marriage was a "sacrament" inasmuch as it was a "sacred sign." Second, St Paul had shown how marriage was related to Christ's union with the Church when he spoke of the "great sacrament." Third, it seemed to Augustine, for various

reasons, that the word *sacramentum* provided the best way to speak about the distinctive holiness of marriage.

As well as affirming the “sacramentality” of marriage, the Fathers wrote about its remedial aspect. The prevailing attitude of churchmen to sexual desire and pleasure was negative, often extremely so. The Fathers usually rejected marriage for themselves. Nevertheless, they could not condemn it. The only way to handle it safely was to bring it into the Church. One could not leave it outside the Church and treat it as a secular matter like other forms of *societas* or other family relationships. For these reasons, any adequate Christian theory of marriage had to deal with the problem of lust. St Paul’s discourse on marriage in 1 Corinthians 7 showed how one could do this. Marriage was a remedy for sexual desire, a way of avoiding its dangers. As Augustine argued, the evil of lust did not make marriage evil; on the contrary, the good of marriage made the evil of lust relatively harmless and pardonable. Celibacy was not the only acceptable way of life for the Christian, but for those who had the strength to undertake it, it was a higher calling. One *should* prefer celibacy to marriage, albeit not as one prefers something good to something bad, but as something (much) better to something good. In this way, marriage became part of Christian historiography. The Fathers could explain what it had been before the Fall, what it had become after the Fall, how the function of marriage and one’s obligations regarding marriage had changed with the advent of Christ, and how there would be no marriage in the world to come.

In all these respects, Augustine was the West’s great theorist of marriage.

How might one best affirm that marriage is “sacramental” in the broad sense outlined above? How might one set it apart from other social relationships and treat it as a religious vocation? The Latin Fathers did this chiefly by insisting on the indissolubility of marriage, and thus upon the prohibition of divorce and remarriage. God permitted divorce, in their view, only on the ground of adultery, and even in that case a divorcee could not remarry as long as the other spouse survived. Marriage was a compact, but unlike other compacts, its terms were absolute and not negotiable. Its permanence was not susceptible to any kind of exemption or exception. From this point of view, any compromise or concession regarding the prohibition of divorce and remarriage seemed to be a failure to accept the demands of the Gospel. To reason that the rules

were inhumane or impractical was to set human reason and human interests above what Christ had taught and commanded. To do other than what the Church required in this matter was to fail to take up one's Cross. The choice was between our will and God's will, between human standards and divine standards.

This fundamental intuition found expression during the fourth century, and thus at a time when the Western Church was forging her own distinctive conception of marriage, in an antithesis between the *lex divina* and the *lex humana*. Marriage was dissoluble under human law but indissoluble under God's law. The antithesis came from Jesus' treatment of divorce in the synoptic gospels. The liberal toleration of divorce and remarriage under Roman law, like the concession that Moses made because of the Jews' hardness of heart, was a human innovation. Adam had declared God's law in the beginning when, speaking as an inspired prophet, he had said that man and wife were to be two in one flesh. No human agent had the right to separate those whom God had joined together. The antithesis was fitting because permanence was an attribute of Heaven while impermanence belonged to this world (cf. Matt. 6:19–21). Moreover, the doctrine served as a shibboleth, for Jesus' teaching on the permanence of marriage had suggested that this was what chiefly distinguished the Christian idea of marriage from that of the pagans as well as from that of the Jews.

Augustine's theory of the sacrament in marriage (the *bonum sacramenti*) was a speculative formulation of these ideas. It involved treating what Jesus had taught about divorce as if it contained a strict prohibition. The remarriage of a divorcee was invalid because the original marriage, or at least some residue of it, remained in existence as long as both the spouses were alive. Augustine explained on pastoral and utilitarian grounds why it was good for Christians to marry, but he refused to allow that similar considerations were relevant to divorce and remarriage. He did not attempt to justify the prohibition on utilitarian grounds. He suggested that by making marriage indissoluble, God had formed from the ephemeral and infirm material of human conduct a symbol of the enduring marriage between Christ and the Church. He saw this as the chief point of assimilation between marriage and Christ's union with the Church. Thus he and his successors treated the prohibition or impossibility of divorce and remarriage as the principal constituent of the sacramentality posited in Ephesians 5:32,

although that discourse makes no explicit reference to the permanence of marriage or to divorce.

At the centre of Augustine's speculations about marriage was a comparison between marriage and baptism. Just as baptism makes a person irrevocably a member of the Church, which is the bride of Christ, so do man and wife become indissolubly united when they marry. The baptized Christian who leaves the Church does not cease to be a member of it. On the contrary, the bond of union (the *sacramentum fidei*) remains, but instead of working for the person's salvation, it works for his or her damnation. This is true even when the Church excommunicates the person for the "spiritual adultery" that is heresy. Similarly, the bond of marriage (the *vinculum*) remains between man and wife as long as both are alive. If a person divorces his spouse and remarries, the original bond remains and works to his damnation. This is true even when one spouse has licitly divorced the other on the ground of adultery. None of this, as far as I can see, amounted in Augustine to an explanation or justification of indissolubility. It was rather a kind of analogical reasoning or argument by isomorphism that aimed to illuminate a regime of marriage by revealing its congruence with some of the chief elements of Christian belief.

The arrival of the regime of indissolubility was a great leap forward in the Christianization of marriage. It brought marriage into the Church; it distinguished marriage in the Church from marriage among pagans and among the Jews; it distinguished the Christian law of marriage from Roman law; and it set marriage above merely human considerations. The regime in question was by definition a strict and rigorist one. It admitted no exceptions. I believe that it sprang up in the Western tradition in the late fourth and early fifth centuries. What had existed before that? Against what background ought we to set it?

Neither the doctrine that man should not separate what God has joined, nor the idea that marriage represents Christ's union with the Church, was new. It was a matter of how one interpreted and applied these principles, and of what one used them to justify. It is probable that hitherto the Church had permitted the husband alone, and not the wife, to divorce an adulterous spouse and to remarry. More important than this, however, is the matter of what standing such rules had within the Church. How strictly did the Church apply them? When someone broke the rules by remarrying, did the Church declare the new marriage to be invalid?

I believe that Noonan is correct in assuming that the marriage laws of the Christian emperors, especially Theodosius and Justinian, give us a fair albeit indirect indication of prevailing attitudes in the Church as they knew it.<sup>1</sup> The emperors wanted to discourage divorce and remarriage, and to this end they restricted the grounds for valid divorce, but because their rationale was humanitarian, they allowed that there were valid grounds for divorce. Moreover, they assumed that the point of divorcing one's spouse was to become free to remarry. Although loss of the right to marry was sometimes the penalty for illicit divorce, the unjustly repudiated partner was usually free to remarry. The notion of the marriage bond was absent. The emperors were seeking to inculcate Christian values, but their policy had little apparent theological or dogmatic basis. Moreover, since the Romans had always thought that marriage was in principle a lifelong relationship, and that divorce and remarriage fell short of the ideal and ancient standards, the divorce laws of the Christian emperors did not amount to any decisive break with Roman tradition.

While this civil regime was not the Church's own policy, it must have been in keeping with it. The Church known to the emperors did not have a doctrine of indissolubility, nor had it yet decisively Christianized marriage in some other way. Christianity made greater demands and set higher standards for marriage, but it did the same for many other walks of life. It set higher standards for the husband as it did for the *pater familias* in relation to his children and to his slaves. The Western Church effected a more radical and decisive form of Christianization by identifying the "sacramentality" of marriage with indissolubility. The Eastern tradition would later affirm the "sacramentality" of marriage and bring marriage into the Church by making it something essentially liturgical, a gift conferred (and sometimes dissolved) by a priest.

A central claim of this study, therefore, is that what one might call "the normative Western position" on divorce and remarriage was relatively new and still localized in the era of Augustine. At this time, it had not yet become established as a canonical doctrine throughout the Western Church, and it never became so established in the East. The chief features of the normative Western position are as follows. First, divorce is

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<sup>1</sup> J. T. Noonan, "Novel 22," in W. Bassett (ed.), *The Bond of Marriage* (1968), 41-90.

licit only on the ground of adultery. Second, the rights of husband and wife in this regard are equal, so that either may divorce the other for adultery. Third, under no condition, not even after licit divorce, may either spouse remarry as long as the other is alive. Fourth, any person who remarries while his or her (former) spouse is still alive becomes married only in appearance. In reality, the new marriage is invalid and non-existent, and the new alliance is not marriage but adultery.

The Carolingian reformers did much to ensure that the law on divorce and remarriage that had become established in the late fourth and early fifth centuries became normative throughout the Western Church. It was in their eyes a cornerstone: one of those doctrines that one could not question without seeming to undermine the Church and the Gospel. A few Carolingian thinkers developed Augustine's theory of marriage. Viewed with hindsight and with later controversies in mind, Augustine and Hincmar seem to have occupied opposite positions regarding the formation of marriage, the former having been a strict consensualist and the latter having been the first to formulate the coital theory. This view, however, obscures Hincmar's debt to Augustine, whose writings on marriage he knew well and quoted from extensively. Hincmar adopted Augustine's theory of the *sacramentum* but tried to incorporate into it the notion of sexual consummation. He took further a tendency already apparent in Augustine whereby the marriage bond was reified; that is to say, he regarded it as a concrete, quasi-physical union, and he reasoned that coitus confirmed or completed the *sacramentum* because the spouses became two in one flesh at this point. The metaphor of the *vinculum* deeply influences one's attitude to marital permanence and dissolution.

While the distinction between divine and human law was not central to the Carolingians' understanding of marriage, they tried to bring marriage more securely within the Church by insisting that ministers of the Church should take part in the nuptial process. At first, this trend was motivated by the Church's need to regulate marriage and to ensure that the people obeyed the rules, but in time the trend led some to suppose that the liturgy of marriage, especially the nuptial blessing, was a vital stage in the process of becoming married. Despite this, persons who were no longer *incorrupti* for one reason or another could not receive the nuptial blessing, but they could marry. Contracting marriage remained in essence a private act.

The Western conception of marriage was not as rich as it might have been. As befitted an outsider's view, it did little to illumine the phenomenology of the married life. If the marriage bond survived not only childlessness and antipathy but even valid divorce, one could not equate with it with any apparent condition or with any set of obligations between the spouses. Nor could one justify the regime on utilitarian grounds alone. The essence of a marriage, from this point of view, was in effect the unavailability of another marriage. Whereas the Roman jurists had defined marriage as a sharing of the spouses' entire life, churchmen maintained that marriage endured when the life-sharing union ceased, and they identified the marriage bond not with anything positive but with something that precluded remarriage and could become a source of damnation.

The fifth chapter of Ephesians depicted in outline a spirituality of the married life. It said nothing about indissolubility. Rather, the author explained how husbands should behave toward their wives, and how wives should behave toward their husbands. He tried to show that Christ's union with the Church was the model that married Christians ought to emulate. The "great sacrament," whatever it may have been, had something to do with this theory. By identifying the "sacramentality" of marriage with indissolubility, Augustine obscured the teaching of Ephesians.

Some medieval charters for divorce by mutual consent presupposed that spouses could dissolve their marriage when Godly charity no longer existed between them and cohabitation had become intolerable. To reject this possibility absolutely—in other words, to maintain that dissolution could not be allowed under any circumstances whatsoever—was to imply that the relationship between the spouses was not of the essence of marriage. It was not what ultimately counted.

## BIBLIOGRAPHY

- Anderson, Gary. "Celibacy or consummation in the Garden? Reflections on early medieval and Christian interpretations of the Garden of Eden." *Harvard Theological Review* 82 (1989), 121-48.
- Anné, L. "La conclusion du mariage dans la tradition et le droit de l'Église latine jusqu'au VI<sup>e</sup> siècle." *Ephemerides Theologicae Lavanienses* 12 (1935), 513-50.
- Aronstam, Robin Ann. "The Latin Canonical Tradition in Late Anglo-Saxon England: the *Excerptiones Egberti*." Ph.D. dissertation, Political Science, Columbia Univ., 1974.
- Baer, Richard A., jr. *Philo's use of the Categories Male and Female*. Arbeiten zur Literatur und Geschichte des hellenistischen Judentums III. Leiden: Brill, 1970.
- Bagnall, Roger S. "Church, State and divorce in late Roman Egypt." In *Florilegium Columbianum* (q.v.), ed. K.-L. Selig and R. Somerville, 41-72.
- Balsdon, J. P. V. D. *Roman Women: their History and Habits*. London: Bodley Head, 1962.
- Barr, Jane. "The Vulgate Genesis and St Jerome's attitude to women." *Studia Patristica* 18 (1982), 268-73.
- Batey, Richard A. *New Testament Nuptial Imagery*. Leiden: Brill, 1971.
- Bernard, J. "Théologie et droit matrimonial". *Revue de Droit canonique* 39 (1989), 69-92.
- Berrouard, M. François. "Augustin et l'indissolubilité du mariage. Évolution de sa pensée." *Recherches Augustiniennes* 5 (1968), 139-55.
- . "L'enseignement de saint Augustin sur le mariage dans le Tract. 9, 2 in Iohannis Evangelium." *Augustinus* 1 (1967), 83-96.
- Besnier, Robert. "Le mariage en Normandie des origines au XIII<sup>e</sup> siècle." *Normannia* 7 (1934), 69-110.
- Beyerle, F. *Gesetze der Burgunden*. Germanenrechte: Texte und Übersetzungen 10. Weimar, Göttingen: Akademie für deutsches Recht, 1936.
- Bishop, Jane. "Bishops as marital advisors in the ninth century." In *Women of the Medieval World* (q.v.), ed. J. Kirshner and S. F. Wemple, 53-84.
- . *The Bond of Marriage: an Ecumenical and Interdisciplinary Study*. Ed. by William J. Bassett. Notre Dame and London: Univ. of Notre Dame Press, 1968.
- Bonner, Gerald. *St Augustine of Hippo: Life and Controversies*. Revised edition. Norwich: Canterbury Press, 1986.
- Brightman, F. E. *The English Rite*. Second edition. Two vols. London: Rivington, 1921.
- Brooke, Christopher N. L. *The Medieval Idea of Marriage*. Oxford: Oxford Univ. Press, 1989.
- Brown, Peter. *Augustine of Hippo: a Biography*. London and Boston: Faber and Faber, 1967.
- . *The Body and Society: Men, Women and Renunciation in Early Christianity*. London: Faber and Faber, 1989.
- Brundage, James A. "Concubinage and marriage in medieval canon law." *Journal of Medieval History* 1 (1975), 1-17.
- . *Law, Sex and Christian Society in Medieval Europe*. Chicago and London: Chicago Univ. Press, 1987.
- Buchner, Rudolf. *Die Rechtsquellen*. In the series *Deutschlands Geschichtsquellen im Mittelalter. Vorzeit und Karolinger*, ed. W. Wattenbach and W. Levison. Weimar: H. Böhlau, 1953.
- Buckland, W. W. *A Text-Book of Roman Law from Augustus to Justinian*. Third



- edition, revised by P. Stein. Cambridge: C.U.P., 1963. [First published 1921.] *Cambridge History of Medieval Political Thought c. 350–c. 1450*. Ed. J. H. Burns. Cambridge: C.U.P., 1988.
- Campbell, G. J. "St Jerome's attitude towards marriage and woman." *American Ecclesiastical Review* 143 (1960), 310–20 and 384–94.
- Castello, Carlo. "Lo strumento dotale come prova del matrimonio." *Studia et documenta historiae et iuris* 4 (1938), 208–44.
- Cereti, Giovanni. *Divorzio, nuove nozze et penitenza nella Chiesa primitiva*. Studi e recherche, 26. Bologna: EDB, 1977.
- Chevrier, Georges, and G. Piéri. *La loi romain des Burgondes. = Ius romanum medii aevi* 1.2.b.aa.d. Milan: Giuffrè, 1969.
- Childs, Brevard S. *Introduction to the Old Testament as Scripture*. London: SCM Press, 1979.
- Clark, Elizabeth A. "Adam's only companion: Augustine and the early Christian debate on marriage." In *The Olde Daunce* (q.v.), ed. R. R. Edwards and S. Spector, 15–31 (with notes on 240–54).
- . *Ascetic Piety and Women's Faith: Essays on Late Antique Christianity*. Studies in Women and Religion 20. Lewiston, N.Y., and Queenston, Ontario: Mellen, 1986.
- . "Heresy, asceticism, Adam and Eve: interpretations of Genesis 1–3 in the later Latin Fathers." In E. A. Clark, *Ascetic Piety and Women's Faith* (q.v.), 353–85.
- . "Vitiated seeds and holy vessels: Augustine's Manichean past." In E. A. Clark, *Ascetic Piety and Women's Faith* (q.v.), 291–349.
- Codex Theodosianus*. Ed. P. Krüger and T. Mommsen. 3 vols. Berlin: Weidmann, 1905.
- Cohen, Jeremy. "Be Fertile and Increase, Fill the Earth and Master it." *The Ancient and Medieval Career of a Biblical Text*. Ithaca and London: Cornell Univ. Press, 1989.
- Corbett, Percy E. *The Roman Law of Marriage*. Oxford: Clarendon Press, 1930.
- Corpus Iuris Canonici*. Ed. A. Friedberg. 2 vols, Leipzig, 1879–81.
- Cosgrove, Art. "Marriage in Medieval Ireland." In *Marriage in Ireland* (q.v.), ed. Art Cosgrove, pp. 25–50.
- Councils and Ecclesiastical Documents relating to Great Britain and Ireland*. Ed. Arthur W. Haddan and William Stubbs. 3 vols. Oxford: Clarendon Press, 1869–78.
- Crook, J. A. *Law and Life of Rome*. London: Thames and Hudson, 1967.
- Crouzel, Henri. "Divorce et remariage dans l'Église primitive. Quelques réflexions de méthodologie historique." *Nouvelle revue théologique* 98 (1976), 891–917.
- . *L'Église primitive face au divorce du premier au cinquième siècle*. Paris: Beauchesne, 1970.
- . "Remarriage after divorce in the primitive church: à propos of a recent book." *Irish Theological Quarterly* 38 (1971), 21–41.
- . "Séparation ou remariage selon les pères anciens." *Gregorianum* 47 (1966), 472–94.
- Daudet, Pierre. *Études sur l'histoire de la juridiction matrimoniale. L'établissement de la compétence le l'église en matière de divorce et de consanguinité (France Xe-XIIe siècles)*. Paris: Sirey, 1941.
- . *Études sur l'histoire de la juridiction matrimoniale. Les origines carolingiennes de la compétence exclusive de l'église*. Paris: Sirey, 1933.
- Davies, W. D., and D. C. Allison. *A Critical and Exegetical Commentary on the Gospel according to Saint Matthew*. Vol. 1 (Matt. I–VII). Edinburgh: T. and T. Clark, 1988.
- Decrees of the Ecumenical Councils*. Ed. Norman P. Tanner. 2 vols. London (Sheed and Ward) and Washinton DC (Georgetown Univ. Press), 1990.

- Dépinay, J. *Le régime dotal. Étude historique, critique et pratique. (Droit français, étranger et international privé.)* Paris: Marchal et Billard, 1902.
- Devisse, Jean. *Hincmar, archevêque de Reims, 845–882*. 3 vols. Geneva, 1975–76.
- Dib, P. "Affinité." *DDC* 1 (1935), 264–285.
- Dictionnaire de droit canonique*. Ed. R. Naz. 7 vols. Paris: Letouzey et Ané, 1907–53.
- The Digest of Justinian*. Ed. T. Mommsen P. Krüger, with an English translation by A. Watson. Philadelphia, Penn.: Univ. of Pennsylvania Press, 1985.
- Donahue, Charles jr. "The case of the man who fell into the Tiber: the Roman law of marriage at the time of the glossators." *American Journal of Legal History* 22 (1978), 1–53.
- Drew, Katherine F. *Law and Society in Early Medieval Europe*. London: Variorum reprints, 1988.
- Early Medieval Kingship*. Ed. P. H. Sawyer and I. N. Wood. Published by the editors under the auspices of the School of History, Univ. of Leeds, 1977.
- Ennen, Edith. *Frauen im Mittelalter*. Second edition. Munich: Beck, 1985.
- . *The Medieval Woman*. Trans. E. Jephcott. Oxford: Blackwell, 1989.
- Esmein, Adhémar. *Le mariage en droit canonique*. Second edition, ed. R. Génestal and J. Dauvillier. Two vols. Paris: Sirey, 1929–35. [First edition Paris, 1891.]
- Études d'histoire du droit canonique*. Dédiées à Gabriel Le Bras. Two vols. Paris: Sirey, 1965.
- Ewig, Eugen. "Studien zur merowingischen Dynastie." *Frühmittelalterliche Studien* 8 (1974), 1–59.
- Fellhauer, David E. "Consortium omnis vitae as a juridical element of marriage." *Studia Canonica* 13 (1979), 3–171.
- Finsterwalder, Paul Willem. *Die Canones Theodori Cantuariensis und ihre Überlieferungsformen*. Untersuchungen zu den Bussbüchern des 7., 8. und 9. Jahrhunderts. Weimar: Hermann Böhlhaus, 1929.
- Flandrin, Jean-Louis. *Families in Former Times: Kinship, Household and Sexuality*. Trans. R. Southern. New York: C.U.P., 1979.
- . *Un temps pour embrasser: aux origines de la morale sexuelle occidentale (VIe-XIe siècle)*. Paris: Seuil, 1983.
- Florilegium Columbianum*. Essays in honor of Paul Oskar Kristeller. Ed. K.-L. Selig and R. Somerville. New York: Italica Press, 1987.
- Folliet, G. "Les trois catégories de chrétiens. Survie d'un thème augustinien." *L'année théologique augustinienne* 14 (1954) 82–96.
- Fournier, P., and G. Le Bras. *Histoire des collections canoniques depuis les Fausses Decretales jusqu'au Decret de Gratien*. Two vols. Paris: 1931–32.
- Frank, R. "Marriage in twelfth- and thirteenth-century Iceland." *Viator* 4 (1973) 473–84.
- Fuchs, Eric. *Sexual Desire and Love: Origins and History of the Christian Ethic of Sexuality and Marriage*. Trans. from the French by M. Daigle. James Clarke, Cambridge, and Seabury Press, New York, 1983. [Originally published as *Le désir et la tendresse* in 1979.]
- Fuhrmann, Horst. *Einfluss und Verbreitung der pseudoisidorischen Fälschungen von ihrem Auftauchen bis in die neue Zeit*. Schriften der Monumenta Germaniae Historica. Deutsches Institut für Erforschung des Mittelalters, 24, I–III. 3 Vols. Stuttgart: Anton Hiersemann, 1972, 1973, 1974.
- . "False Decretals (Pseudo-Isidorian Forgeries)." *New Catholic Encyclopedia*, vol. 5, 820–24.
- Ganshof, F. L. "Le statut de la femme dans la monarchie franque." *Société Jean Bodin, Recueils* 12 (1962), 5–58.
- Gardner, Jane F. *Women in Roman Law and Society*. London: Croom Helm, 1976.
- Gaudemet, Jean. "Indissolubilité et consommation du mariage. L'apport d'Hincmar de Reims." *Revue de Droit canonique* 30 (1980), 28–40.

- . "L'apport d'Augustin à la doctrine médiévale du mariage." *Augustinianum* 27 (1987), 559–570.
- . *L'Église dans l'empire romain (IVe-Ve siècles)*. = *Histoire du droit et des institutions de l'Église en occident* 3. Paris: Sirey, 1958.
- . *Le Bréviaire d'Alaric et les Épitomes*. = *Ius romanum medii aevi* 1.2.b.aa.b. Milan: A. Giuffrè, 1965.
- . "Le lien matrimonial: les incertitudes du haut moyen-âge." *Revue de Droit canonique* 21 (1971), 81–105.
- . *Le mariage en occident. Le moeurs et le droit*. Paris: Cerf, 1987.
- . "Recherche sur les origines historiques de la faculté de rompre le mariage non consommé." *Proceedings of the Fifth International Congress of Medieval Canon Law*. Ed. S. Kuttner and K. Pennington. *Monumenta Iuris Canonici*, series C, subsidia, vol. 6 (Vatican City, 1980), 309–32.
- . *Sociétés et mariage*. Strasbourg: CERDIC, 1980. [Collected articles.]
- . [Review of Joseph Huber, *Der Ehekonsens im Römischen Recht*, q.v.] *Revue d'Histoire de droit*, = *Tijdschrift voor Rechtsgeschiedenis*, 47 (1979), 171–73.
- Gellinek, C. "Marriage by consent in literary sources of medieval Germany." *Studia Gratiana* 12 (1967) 557–79.
- Goetz, Hans-Werner. *Leben im Mittelalter vom 7. bis zum 13. Jahrhundert*. Munich: C. H. Beck, 1986.
- Goody, Jack. *The Development of the Family and Marriage in Europe*. Cambridge: C.U.P., 1983.
- . *The Oriental, the Ancient and the Primitive: Systems of Marriage and the Family in the Pre-Industrial Societies of Eurasia*. Cambridge: C.U.P., 1990.
- Haring, Nicholas M. "St Augustine's use of the word *character*." *Mediaeval Studies* 14 (1952), 79–97.
- von Hefele, Karl. J., and H. Leclercq. *Histoire des conciles d'après les documents originaux*. 11 vols. Paris: Letouzey and Ané, 1907–52.
- Helmholz, R. H. *Marriage Litigation in Medieval England*. Cambridge: C.U.P., 1974.
- Héring, Jean. *The First Epistle of Saint Paul to the Corinthians*. Trans. A. W. Heathcote and P. J. Allcock. London: Epworth, 1962.
- Herlihy, David. "The family and religious ideologies in medieval Europe." *Journal of Family History* 12 (1987), 3–17.
- . *Medieval Households*. Cambridge, Mass.: Harvard Univ. Press, 1985.
- Hilaire, Jean. *Le régime des biens entre époux dans la région de Montpellier du début du XIIIe siècle à la fin du XVIe siècle*. Montpellier: Imprimerie Causse, Graille et Castelnau, 1957.
- Hill, Rosalind. "Marriage in seventh-century England." In M. H. King and W. M. Stevens (eds), *Saints, Scholars and Heroes* (Collegeville, Minnesota: Hill Monastic Manuscript Library, Saint John's Abbey and University, 1979), 67–75.
- Hope, D. M. *The Leonine Sacramentary: a Reassessment of its Nature and Purpose*. London: O.U.P., 1971.
- von Hörmann, W. *Quasiaffinität. Rechtshistorische Untersuchungen zu den Affinitätswirkungen der Verlobnisses nach westlichem und kirchlichem Rechte*. 2 vols. Innsbruck, 1906.
- Huber, Joseph. *Der Ehekonsens im römischen Recht*. = *Analecta Gregoriana* 204. Rome: Università Gregoriana, 1977.
- Hughes, Diane Owen. "From brideprice to dowry in mediterranean Europe." *Journal of Family History* 3 (1978) 262–96.
- James, Edward. *The Origins of France from Clovis to the Capetians 500–1000*. London: Macmillan, 1982.
- Jeauneau, Édouard. "La division des sexes chez Grégoire de Nysse et chez Jean Scot Érigène." In *Eriugena. Studien zu seinen Quellen*, ed. Werner Beierwaltes, Heidelberg, 1980.

- Jeremias, Joachim. *Jerusalem in the Time of Jesus*. Trans. F. H. and C. H. Cave. London: SCM Press, 1969.
- Jerome Biblical Commentary*. Ed. R. E. Brown, J. A. Fitzmyer and R. E. Murphy. Two vols. London: Chapman, 1969 [and New Jersey: Englewood Cliffs, 1968].
- Jochens, Jenny M. "The Church and sexuality in medieval Iceland." *Journal of Medieval History* 6 (1980), 377-92.
- Joyce, George Hayward. *Christian Marriage: an Historical and Doctrinal Study*. London and New York: Sheed and Ward, 1933.
- Kalifa, Simon. "Singularités matrimoniales chez les anciens Germains. Le rapt et le droit de la femme à disposer l'elle-même." *Revue historique de droit français et étranger*, 4th series, 48 (1970), 199-225.
- Kelly, J. N. D. *Jerome: his life, writings and controversies*. London: Duckworth, 1975.
- Kelly, William. *Pope Gregory II on Divorce and Remarriage: a canonical-historical investigation of the letter "Desiderabilem mihi" with special reference to the response "Quod proposuisti"*. Analecta Gregoriana 203, Ser. Fac. Iuris Can. sectio B, 37. Rome: Università Gregoriana, 1976.
- King, P. D. *Law and Society in the Visigothic Kingdom*. Cambridge: C.U.P., 1972.
- . "The Barbarian Kingdoms." In *Cambridge History of Medieval Political Thought* (q.v.), 123-53.
- Köstler, Rudolf. "Raub-, Kauf- und Friedelehe bei den Germanen." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, germanistische Abteilung* 63 (1943), 92-136.
- . "Ringwechsel und Trauung." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 22 (1933), 1-33.
- Landau, P. "Hadrians IV Decretale *Dignum est* (X 4.9.1) und die Eheschließung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts." *Studia Gratiana* [= *Collectanea S. Kuttner*, vol. 2] 12 (1967), 511-53.
- Law, Church and Society: Essays in Honor of Stephan Kuttner*. Ed. Kenneth Pennington and R. Sommerville. Univ. of Pennsylvania Press, 1977.
- Le Bras, Gabriel. "Mariage. La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille." *Dictionnaire de théologie catholique* 9.2, 2123-2317.
- Le lien matrimoniale*. Colloque du CERDIC. Ed. R. Metz and J. Schlick. Strasbourg: CERDIC, 1970.
- Lemaire, André. "La dotatio de l'épouse de l'époque mérovingienne au XIIIe siècle." *Revue historique de droit français et étranger*, 4th series, 8 (1929) 569-80.
- . "Origine de la règle *Nullum sine dote fiat coniugium*." In *Mélanges Paul Fournier* (q.v.), 415-24.
- Levin, Eve. *Sex and Society in the World of the Orthodox Slavs, 900-1700*. Ithaca and London: Cornell Univ. Press, 1989.
- Levy, Ernst. "Vulgarization of Roman Law in the Early Middle Ages, as illustrated by successive versions of *Pauli sententiae*." *Medievalia et Humanistica* 1 (1943), 14-30.
- . *West Roman Vulgar Law: the Law of Property*. Philadelphia: American Philosophical Society, 1951.
- Lynch, Joseph H. *Godparents and Kinship in Early Medieval Europe*. Princeton: Princeton Univ. Press, 1986.
- Mackin, Theodore. *Divorce and Remarriage*. New York: Paulist Press, 1984.
- . "Ephesians 5:21-33 and radical indissolubility". In *Marriage Studies* III (q.v.) 1-45.
- McKitterick, Rosamond. *The Carolingians and the Written Word*. Cambridge: C.U.P., 1989.

- McNamara, Jo-Ann, and S. F. Wemple. "Marriage and divorce in the Frankish Kingdom." In *Women in Medieval Society* (q.v.), ed. Susan Mosher Stuard 95–124.
- Maimonides. *The Code of Maimonides, Book 4: The Book of Women*. Trans. Isaac Klein. New Haven: Yale Univ. Press, 1972.
- Manenti, C. *Dell'inapponibilità di condizioni al negozi giuridici e in specie delle condizioni apposte al matrimonio*. Siena, 1889.
- Marriage in Ireland*. Ed. Art Cosgrove. Dublin: College Press, 1985.
- Marriage, Divorce and Children in Ancient Rome*. Ed. Beryl Rawson. Humanities Research Centre, Canberra, and Clarendon Press, Oxford, 1991.
- Marriage Studies: Reflections in Canon Law and Theology*. Vol. III, ed. Thomas P. Doyle. Washington, D.C.: Canon Law Soc. of America, 1985.
- Il matrimonio nella società altomedievale*. Settimane di studio del Centro italiano di studi sull'alto medioevo 24. 2 vols. Spoleto: Presso la Sede del Centro, 1977.
- Mélanges Paul Fournier*. Publiées sous les auspices de la Société d'histoire du droit. Paris: Sirey, 1929.
- Merêa, Paulo. "Le mariage *sine consensu parentum* dans le droit romain vulgaire occidental." *Revue internationale des droits de l'antiquité* 5 (= *Mélanges Fernand Visscher* IV) (1950), 203–17.
- Metz, René. "Le statut de la femme en droit canonique médiéval." *Société Jean Bodin, Recueils* 12 (1962), 59–113.
- Meyer, H. "Friedelehe und Mutterrecht." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, germanistische Abteilung* 47 (1927), 198–286.
- Michaélidès, Dimitri. *Sacramentum chez Tertullian*. Paris: Études Augustiniennes, 1970.
- The Mishnah*. Trans. by H. Danby. Oxford: O.U.P., 1933.
- Munier, C. "Divorce, remariage et pénitence dans L'Église primitive." *Revue des sciences religieuses* 52 (1978), 97–117.
- Nautin, P. "L'*Opus imperfectum in Mattheum* et les Ariens de Constantinople." *Revue d'Histoire ecclésiastique* 67 (1972), 380–408 and 745–766.
- Nicholas, Barry. *An Introduction to Roman Law*. Oxford: Clarendon Press, 1962.
- Noonan, John T., jr. *Contraception: a History of its Treatment by the Catholic Theologians and Canonists*. Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 1965.
- . "Marital affection in the canonists." *Studia Gratiana* 12 (1967), = *Collectanea Stephan Kuttner* II, 479–509.
- . "Novel 22." In *The Bond of Marriage* (q.v.), ed. W. Bassett, 41–90.
- . "Power to choose." *Viator* 4 (1973), 419–34.
- Ó Corráin, Donnchadh. "Marriage in early Ireland." In *Marriage in Ireland* (q.v.), ed. Art Cosgrove, pp. 5–24.
- Oesterlé, G. "Consanguinité." *DDC* 4 (1949) 232–48.
- The Olde Daunce: Love, Friendship and Marriage in the Medieval World*. Ed. Robert R. Edwards and S. Spector. New York: S.U.N.Y. Press, 1991.
- Oppenheimer, Helen H. *The Marriage Bond*. Leighton Buzzard: Faith Press, 1976.
- Quasten, Johannes. *Patrology*. 3 vols. Westminster, Md.: Newman Press, 1950, 1953, 1960.
- Rabinowitz, J. "On the definition of marriage as *consortium omnis vitae*." *Harvard Theological Review* 57 (1964), 55–56.
- Rackham, R. B. "The text of the canons of Ancyra." *Studia Biblica et Ecclesiastica* 3 (1891), 139–216.
- Reuter, Amandus. *Sancti Aurelii Augustini doctrina de bonis matrimoniis*. *Analecta Gregoriana*, vol. 27, Series Theologica, Sectio B (n. 12). Rome: Gregorian Univ., 1942.
- Reynolds, Philip L. "Bonaventure on gender and Godlikeness." *Downside Review* 106 (1988), 171–94.

- . "Marriage, sacramental and indissoluble: sources of the Catholic doctrine." *Downside Review* 109 (1991), 105–150.
- Richardot, Hubert. *Les pactes de séparation amiable des époux*. Paris: Dalloz, 1930.
- Ritzer, Korbinian. *Formen, Riten und religiöses Brauchtum der Eheschliessung in den christlichen Kirchen des ersten Jahrtausends*. Münster: Aschendorff, 1962.
- . *Le mariage dans les Églises chrétiennes du Ier au XIe siècle*. Paris: Cerf, 1970. [Trans. from the German, *Formen, Riten und religiöses Brauchtum*, q.v.]
- Robinson, I. S. "Church and Papacy." In *Cambridge History of Medieval Political Thought* (q.v.), 352–305.
- Rondet, Henri. *Introduction à l'étude de la théologie du mariage*. Paris: Lethielleux, 1960.
- Schillebeeckx, Édouard. *Marriage: Secular Reality and Saving Mystery*. Trans. N. D. Smith. 2 vols. London and Melbourne: Sheed and Ward, 1965. [New edition in one volume, London: Sheed and Ward, 1976.]
- Schmitt, Emile. *Le mariage chrétien dans l'œuvre de saint Augustin: une théologie baptismale de la vie conjugale*. Paris: Études Augustiniennes, 1983.
- Schmitt, J. "Tradition et relectures au premier siècle chrétien." *Revue de droit canonique* 30 (1980) 55–68.
- Schott, Clausdieter. "Der stand der Leges-Forschung." *Frümittelalterliche Studien* 13 (1979), 29–55.
- Schumpp, Meinrad M. *Das Buch Tobias*. Münster in Westf.: Aschendorff, 1933.
- Sheehan, Michael M. "Theory and practice: marriage of the unfree and the poor in medieval society." *Mediaeval Studies* 50 (1988) 457–87.
- Stein, P. G. "Roman Law." In *Cambridge History of Medieval Political Thought* (q.v.), 37–47.
- Stevenson, K. W. "The Origins of the Nuptial Blessing." *Heythrop Journal* 21 (1980), 412–416.
- The Theodosian Code*. Trans. Clyde Pharr. Princeton Univ. Press, 1952.
- Thomas, J. A. C. *Textbook of Roman Law*. Amsterdam: North Holland Publishing Company, 1976.
- Thomas, P. J. *Introduction to Roman Law*. Deventer, Netherlands: Kluwer Law and Taxation Publishers, 1986.
- Toubert, Pierre. "La théorie de mariage chez les moralistes carolingiens." In *Il matrimonio nella società altomedievale* (q.v.), vol. 1, 233–82 (followed by discussion, 283–85).
- Treggiari, Susan. "Consent to Roman Marriage: some aspects of law and reality." *Classical Views*, = *Echos du monde classique*, n.s. 26 (1982), 34–44.
- . "Divorce Roman Style: how easy and how frequent was it?" In *Marriage, Divorce and Children in Ancient Rome* (q.v.), ed. B. Rawson, 31–46.
- . "Roman Marriage." In *Civilization of the Ancient Mediterranean: Greece and Rome* (New York: Scribners, 1988), vol. 3, 1343–1354.
- . *Roman Marriage: "iusti coniuges" from the Time of Cicero to the Time of Ulpian*. Oxford: Clarendon Press, 1991.
- Verlinden, Charles. "Le 'mariage' des esclaves." In *Il matrimonio nella società altomedievale* (q.v.), vol. 2, 569–93.
- Veyne, P. "La famille et l'amour sous le haut-empire Romain." *Annales* 33 (1978), 35–63.
- Villers, Robert. *Rome et le droit privé*. Paris: Albin Michel, 1977.
- Vinogradoff, Paul. *Roman Law in Medieval Europe*. 2nd ed. Oxford: Clarendon Press, 1929.
- Vliet, A. H. van, and C. G. Breed. *Marriage and Canon Law: a Concise and Complete Account*. London: Burns and Oates, 1964.
- Vogel, Cyrille. "Le rôle du liturge dans la formation du lien conjugal." *Revue de Droit canonique* 30 (1980) 7–27.
- . "Les rites de la célébration du mariage: leur signification dans la formation du lien durant le haut moyen âge." In *Il matrimonio nella società altomedievale* (q.v.), vol. 1, 397–465 (followed by discussion, 467–72).

- Volterra, Edoardo. "Iniustum matrimonium." In *Studi in onore di Gaetano Scherillo* (Milan: Cisalpino-La Goliardica, 1972, 3 vols), vol. 2, 441-70.
- . *La conception du mariage d'après les juristes romains*. Padua: "La Garangola," 1940.
- Wahl, Francis X. *The Matrimonial Impediments of Consanguinity and Affinity: an historical synopsis and commentary*. Washington, D.C.: Catholic Univ. of Am., 1934.
- Wallace-Hadrill, J. M. *The Frankish Church*. Oxford: Clarendon Press, 1983.
- Wasserschleben, Hermann. *Die Bussordnungen der abendländischen Kirche*. Halle: Graeger, 1851. Repr. Graz: Akademische Druck- und Verlagsanstalt, 1958.
- Watson, Alan. *Rome of the XII Tables: Persons and Property*. Princeton Univ. Press, 1975.
- . *The Law of Persons in the Later Roman Republic*. Oxford: Clarendon Press, 1967.
- Wemple, Suzanne F. *Women in Frankish Society: Marriage and the Cloister, 500-900*. Philadelphia: Univ. of Pennsylvania Press, 1981.
- Williams, S. "The pseudo-Isidorian problem today." *Speculum* 29 (1954), 702-7.
- Wolff, Hans J. "Doctrinal Trends in Postclassical Roman Marriage Law." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 67 (1950), 261-319.
- . *Written and Unwritten Marriages in Hellenistic and Postclassical Law*. Haverford, Pa.: American Philological Association, 1939.
- Women of the Medieval World: Essays in Honor of John H. Mundy*. Ed. Julius F. Kirshner and S. F. Wemple. Oxford and New York: Blackwell, 1985.
- Women in Medieval Society*. Ed. Susan Mosher Stuard. Philadelphia: Univ. of Penn. Press, 1976.
- Wormald, P. "*Lex scripta* and *verbum regis*: legislation and Germanic kingship, from Euric to Cnut." In *Early Medieval Kingship* (q.v.), ed. P. H. Savage and I. N. Wood, 105-38.





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